

Steven Lutvak: The Journey Of A Gentleman  
The History of "A Gentleman's Guide To Love And Murder"

by

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## ABSTRACT

The path to producing a Broadway Musical is not easily trod, and in the case of *A Gentleman's Guide To Love And Murder*, the journey was filled with rewrites (the title of the show went from *Kind Hearts And Coronets* to *The Truth About Monty* and finally became *A Gentleman's Guide To Love And Murder*), cast changes (only one member of the show that is currently running on Broadway was with the show in its original form), multiple producers, and a lawsuit. Through it all, the musical's creator, Steven Lutvak, a well-known songwriter and cabaret artist who is one of the most sought after vocal coaches in NY, navigated these hurdles by throwing himself at the process whole-heartedly. In creating *A Gentlemen's Guide To Love and Murder*, Lutvak labored ardently through the process: making the necessary musical and textual changes, creating opportunities to showcase his work, enticing producers and, when he wasn't putting up his own money, locating the financing to fund the production, including taking on the enormous cost of a lawsuit. In this paper, I will present the musical and personal development of Lutvak in his journey to and in creating and composing the successful Broadway musical *A Gentlemen's Guide to Love and Murder*. I will focus specifically the legal and administrative difficulties associated with obtaining the rights for the production, in order to support the argument that these struggles shaped and transformed the production into the artistic and commercial success seen on Broadway, and across the country on its 2015 national tour. Methodologically, this paper is part assisted memoir, part textual analysis, and part insider observations, substantiated with court documentation and published reviews of Lutvak's work.

## DEDICATION

I would like to dedicate this work to my wonderful parents Dr. David and Annis Shepherd, who have raised an unabashed anglophile: part by nature (my mother's family is British and my roots are traced throughout the British monarchy with a Lord Mayor of London thrown in to boot), and part by nurture (we lived for years in Australia where my mother wrote pantomimes which we would put on in the backyard, which was a forest with a clearing in the middle at its center was a birdbath). My first role was "Gertrude Guzzletop" in my mother's adaptation of the fairytale *Little Red Riding Hood*. In this play I was truly "a fairy at the bottom of our garden." The very first song I remember learning was written for this production, and I appeared in a white tutu with red ballet slippers and a wand singing:

### *I Am A Little Fairy*

I am a little fairy, and my toes are sort of hairy, and my tummy is a subtle shade of green.  
I think I am quite handsome, and those who say I'm fearsome, only say it cause they're really very mean.  
But I don't give a damn whatever I am, as long as I am me!  
I am what's called romantic, and my love life it is hectic  
my boyfriends are numbered by the score.  
Those who are quite jealous, say that I am over zealous  
when handing out cookies at the door.  
But I don't give a damn whatever I am, as long as I am me!

When we first moved back to the United States, I was in second grade and for two weeks refused to say the Pledge of Allegiance maintaining that I owed my allegiance to Queen Victoria. I am sure this was intended to garner attention rather than because of a truly heart-felt loyalty. Nevertheless, I grew up firmly attached to everything British, an attitude I still maintain today. My parents were very supportive of my desire to be a musical theatre actress. When I was in the fourth grade, my mother helped me take the libretto of *The Sound of Music* and winnow it down so that I could put it on at my elementary school. I assembled some of my classmates and wrangled them to rehearse the show in the library during recess. On the day of performance my

parents helped me bring all the props and costumes (many of them borrowed from my dance school) from home. The entire 4<sup>th</sup> grade gathered for the performance, where I ran up and down from the stage turning the lights on and off for the scene changes while playing Maria. All through my childhood, one or the other of my parents were running me to dance lessons, piano lessons and various community theater and school rehearsals. My father was convinced I was going to be an opera singer, and drove or flew me to competitions in the hopes that others would think I was as marvelous as he did. When I became involved with *Kind Hearts and Coronets*, my parents were delighted as they were cinephiles and loved the film and Alec Guinness's portrayal of the D'Ascoyne Family. My parents were so supportive and even drove up to Utah and the Sundance Theatre Festival to watch the presentation of *Kind Hearts and Coronets* in 2006. I would not be where I am today without the love and encouragement of these brilliant, kind and talented people.



## ACKNOWLEDGMENTS

I would like to acknowledge and thank my brilliant and talented committee members, who have supported and encouraged me throughout my time at ASU, as well as throughout this Doctoral process. They have been unstinting with their time and talents and have motivated me and helped me become the performer I am today. To professors David Britton, William Reber, Dale Dreyfoos and Kay Norton. Thank you so much for everything.

I would also like to acknowledge and thank Steven Lutvak for being willing to allow me access to his life and thoughts in preparing for this project, as well as for the creation of this marvelous work, *A Gentleman's Guide to Love and Murder*. Steven has been a friend, mentor and a colleague I am very grateful to have him in my life.

Last and certainly not least, I would like to thank the lovely and talented Skyler Bean for helping me navigate the technical waters and getting this document off the paper and onto the screen. I couldn't have done it without you!

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## PREFACE

My relationship with Steven Lutvak goes back to 2001. We met for the first time when, on the advice of a friend, I went to Steven for vocal coaching. I had one session with him, and was immediately interested and convinced he was the perfect coach for me. The history of *Kind Hearts and Coronets* is interesting to me for many reasons. It was only after a few coaching's that Steven began to mention this project he was working on, and that he was very excited about. Already an animated person, Steven would light up when talking about how everything was proceeding, and even played the original song demo recordings he had done for the original presentation to Canal+. One day, I came to my lesson and he said very excitedly, "I think there is a role in this that you would be perfect for! Her name is Maude, and she is the rather bovine and dense proposed fiancée to the Duke, and there is this wonderful line about how the girl is meant for breeding... and it's just perfect for you!" He was just so enthusiastic and sincere, all the time, in my mind I was thinking "he thinks I am perfect to play the part of a witless cow... am I flattered?" Well of course I was flattered and excited about the project, and thought the role was hilarious. It was a great character role, and as Steven had mentioned, perfect for me vocally and physically. I did end up recording Maude for his demo of *Kind Hearts and Coronets*, and eventually continued with the project, as well as voicing characters (Theodora/Toad) in '*Almost September*' and the characters of (Aimee Semple McPherson/Shirley Temple) in *Campaign of the Century*.

This process of getting *A Gentleman's Guide to Broadway* has been full of ups and downs, not only because Steven is a dear friend and I have watched him go through so much to accomplish his dreams, but for myself as well. I was a part of the original production and then voiced the role of Miss Shingle through the Playwrights Horizon performance in 2009, when the decision was made to cast someone older in the role. I love this work, I love the characters and the conceits, and think that the lyric writing is some of the best done in the last 20 years. Steven was kind enough to provide me with all the information I needed to write this document. He flew to Arizona to accompany me in my final Doctoral recital on February 11, 2014, in which we presented his material and told his story. I was overjoyed to watch how this all turned out the

accolades, rewards and recognition, as well as the personal vindication and satisfaction he has received. Regrettably, examples of his music lay outside the scope of this paper, but examples are readily available at Lutvak's website, [www.stevenlutvak.com](http://www.stevenlutvak.com), and from commercial vendors.

Finally, it must be stated that this paper contains indisputable bias. Not only was I a part of the pre-Broadway production, but I have a personal relationship with Lutvak, a relationship which made possible the recollections featured throughout this paper. I have made every effort to present Steven Lutvak's recollections faithfully. However, those recollections do not indicate an absolute truth, and represent the experience of Lutvak, which may differ from the hundreds of people involved with bringing *A Gentlemen's Guide to Love and Murder*. I assume no responsibility for the presentation of absolute truth in any sense; as Leo Treitler remarked, rather drily, "Music history is, among other things, a discourse of myth through which 'Western civilization' contemplates and presents itself."<sup>1</sup> Every historical account betrays the perspective of the author and her sources. That being said, this project offers crucial and unprecedented access to the length process of gestation, creation, and production of a Broadway musical.

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<sup>1</sup> Leo Treitler, "Gender Dualities and Other Dualities of Music History," in *Musicology and Difference: Gender and Sexuality in Music Scholarship*, ed. Ruth Solie (Berkeley: University of California Press, 1993), 23.

## CHAPTER 1

### STEVEN LUTVAK: BROADWAY COMPOSER

Steven Jaret Lutvak was born in 1959 at Lebanon Hospital in the Bronx, NY. His father, Alfred, was an English teacher who later became a junior high school principal, and his mother, Sylvia, was a long-term secretary for a construction company.<sup>2</sup> They settled their budding family in Little Neck, Queens. Lutvak attended New York Public School 221 until the 2nd grade, then transitioned to Brookside Elementary School in Bellmore, NY. Attracted to the arts at a young age, Lutvak desperately wanted to dance and begged his parents for ballet lessons. Wanting to foster this newfound curiosity, his parents took him to a local shop to purchase Steven's first pair of dancing shoes. The owner, a 'Mr. Baum', pulled them aside and said, "Do you know what your son will become if you let him dance?" They said they didn't, and he whispered, "A butterfly." Lutvak was given piano lessons instead. Like many parents, Alfred and Sylvia had some reservations about their son's chosen vocation in the arts, but eventually came around giving him their full support.

A love of music runs in Steven's veins. His passion came down from his maternal grandmother, who played the piano by ear, and his mother, who took up the piano when she was young, but forsook the practice when she became pregnant. This passion for music did not necessarily translate into musical ability for the rest of the Lutvak family. According to Lutvak: "The love of music is there, however, no one in my immediate family can carry a tune. Happy Birthday, though delightful, is a musical nightmare."<sup>3</sup>

Despite his family's musical ineptitude, Lutvak's inherent creative and artistic qualities, as well as his inherited passion for music, were evident by age six when he composed an opera/spoof melodrama, complete with a mid-performance commercial break advertising dog food. Additionally, the opera showcased Steven's gift with words. It began with a narration: "The villain kissed the heroine upon her trembling lips, she said, 'if you dare try that once again...'"<sup>4</sup>

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<sup>2</sup> This and all other accounts from Lutvak's life were related by the composer in conversation with me during the period March 2012 through December 2014.

<sup>3</sup> *Ibid*

<sup>4</sup> Manuscript courtesy of Steven Lutvak

It was during his adolescent years that Lutvak met one of his mentors, his piano teacher Gilda Nelson, a woman very dear to Steven who was instrumental in his development. He describes her in a 1986 song called "Mrs. Whitney," from his first CD, *The Time It Takes*.

*MRS WHITNEY*

MRS. WHITNEY TAUGHT ME THE PIANO,  
BEFORE MY FEET COULD EVEN REACH THE PEDALS.  
"KEEP YOUR BACK STRAIGHT,  
FINGERS HIGH"  
MRS. WHITNEY SAID.  
AND LIKE A G CLEF SHE WAS ROUND  
AND HER HAIR WAS WOUND AROUND THE CROWN OF HER HEAD.  
OOH SHE LOVED BRAHMS,  
THE RHAPSODIES ESPECIALLY.  
SHE WOULD PLAY IT FIRST FOR ME,  
THEN I WOULD PLAY  
AND SOMETIMES SHE WOULD PLAY FROM *MY FAIR LADY*.  
MRS. WHITNEY TAUGHT ME THE PIANO  
EVERY THURSDAY AFTERNOON AT 4.  
USE THE PEDAL,  
USE IT LIGHTLY,  
AND SHE TAUGHT MUCH MORE.  
WHICH WAS BAD  
AND WHICH WAS GOOD  
AND WHAT A SHAME THE NEIGHBORHOOD IS CHANGING.  
BE CAREFUL.  
OOH SHE LOVED RECITALS.

THEY BROUGHT TO HER SUCH NEVER ENDING JOYS.  
THE GOOD ONES MADE MUSIC,  
THE BAD ONES MADE NOISE.  
SHE'D WHISPER WHO WAS JEWISH  
AND WHICH ONES LIKED LITTLE BOYS.  
BE CAREFUL.  
MRS. WHITNEY TAUGHT ME THE PIANO  
UP UNTIL WE MOVED WHEN I WAS 9.  
MRS. WHITNEY TAUGHT ME ALL ABOUT THE WORLD,  
AND EVERYTHING THAT SHE COULD PLAY SHE WOULD SHOW ME HOW.  
BUT WHATEVER WOULD SHE SAY IF SHE COULD SEE ME NOW?  
BE CAREFUL.<sup>5</sup>

Not only does the musical structure speak to the charm and color of his childhood, the lyric gives us a wonderful insight into his formative years.

At the age of 9, Lutvak's parents moved the family to Merrick, Long Island. There Lutvak met Larry Lawrence, the nephew of Steve Lawrence, (of Steve Lawrence and Eydie Gorme fame). They began to write music together throughout their years together at Brookside Junior High and Bellmore Kennedy High School. By the time of Lutvak's graduation, the pair had written approximately 350 songs together.

Lutvak's musical awareness developed further through his choir participation in junior high and high school. In junior high he accompanied the choir on the piano, and also began singing in the choir upon reaching High School. Lutvak describes his high school choral teacher, Patrick Variano, as a wonderful, difficult and complicated man, who alternately adored him and mistreated him, and finally, turned against Steven. Only at the end of Lutvak's high school years was the teacher's behavior explained after a parent attempted to discuss this mistreatment of Lutvak with Mr. Variano. The teacher feared that he would "out" himself as a homosexual by demonstrating favor for Steven. Lutvak speaks of this time recalling "It was upsetting to think of

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<sup>5</sup> Manuscript courtesy of Steven Lutvak

the levels of self-hate that would have caused one to behave like that. He was a wonderful teacher and very important in my education – and he left a complicated legacy.”<sup>6</sup>

Steven’s teen years were not all piano and music. During high school, he delved into the sports world, working at Yankee Stadium as a vendor for three years. The venture was rather unsuccessful, however, as Steven found himself starting every day with \$40 and ending up with \$21, having no idea where the rest had gone.

Following high school Lutvak did his undergraduate work at the State University of New York, Binghamton. There he graduated with his Bachelor of Arts degree in 1980. During his studies Lutvak met and worked with Sue Peters, a Professor of Musical Theater at the university. To this day, Lutvak credits her as being a valuable mentor and one of his favorite teachers. Having further developed his remarkable skills on the piano, and following discussions with his professors about his potential, Lutvak contemplated a career as a classical pianist. After composing his first show (another spoof-melodrama called *Love Rides the Rails*) Lutvak made his choice to pursue his love of musical theater writing. It was also around this time that Lutvak took a trip with his father to England. On February 12, 1979, Lutvak attended a performance at the Players’ Theatre. The Player’s Theater was the last existing theater in London that programmed songs from the British Music Hall Era. The performance was called “*Ridgeway’s Late Joys*” and was, in his memory, fantastic. The lyrics were included in the program, and the audience was encouraged to sing along on the repeated choruses. These songs included classic Music Hall numbers like “She Was One of the Early-Birds” and “Are We to Part Like This, Bill?” Lutvak also brought back a music book called *Songs of the British Music Hall* which he played from nonstop. This style of music and lyric writing definitely informed Steven’s song writing.

During this time, Lutvak worked at piano bars and began coaching singers to support himself. He became known in NYC for helping artists select suitable songs for their voices, utilizing his gifts and knowledge of music and style to pair singers with pieces that matched their vocal qualities and personality. This gift is one Lutvak still uses today, making him a highly sought

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<sup>6</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014



after vocal coach in New York. Being overworked and underpaid caused Lutvak to have many sleepless nights. During one of these bouts of insomnia, Lutvak found himself wide-awake and restless at 3:00 am. Turning on the television, he found himself watching an old black and white movie from the 1950's starring Alec Guinness, called *Kind Hearts and Coronets*. Remembering it was one of his father's favorite movies, Steven settled back to watch and enjoy. Midway through the movie the idea struck Lutvak that the story possessed the perfect structure for a musical. Steven recalls that *Kind Hearts and Coronets* "seemed to sing to me. I thought *this* is a musical and it's mine to do." <sup>7</sup>

Lutvak reapplied for the undergraduate program at the Manhattan School of Music, seeking to further his musical training by receiving more advanced and varied education. After completing his first year in the program at the Manhattan School, Lutvak heard that New York University had started a Graduate Musical Theater Program, which was the first of its kind in the country. Lutvak applied to NYU and began the coursework for his Masters Degree. While still studying at NYU, Lutvak had the opportunity to work and study with such industry greats as Leonard Bernstein, Arthur Laurents, Jule Styne, Betty Comden and Adolph Green, and Stephen Sondheim. Lutvak also attended workshops and lectures with visionaries such as Hal Prince, Michael Bennett and Jonathan Tunick. Steven continued to hone his skills and understanding of the craft, developing the philosophy that "a song is a one act play. You have to be at a different place at the end of the song than you were at the beginning." <sup>8</sup>

At NYU, Lutvak met his writing partner for *A Gentleman's Guide to Love And Murder*, Robert L. Freedman, an MFA degree candidate in Dramatic Writing and Musical Theater Writing at the University. The duo composed their very first song together, titled "Hello Mr.BeeBee." Lutvak and Freedman proceeded to graduate with their Masters degrees in 1983.

During the ensuing years, Lutvak composed prolifically. He wrote not only cabaret pieces, many of which would later earn him various awards and accolades, but also began scoring for film and composing musicals such as *Esmeralda*, which earned him a New American Work Grant

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<sup>7</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

<sup>8</sup> *Ibid*

from the National Endowment for the Arts. Based on the classic novel *The Hunchback of Notre Dame*, *Esmeralda* had its premiere at the Studio Theater of the Repertory Theatre of St. Louis in 2000. One of the songs that Lutvak wrote for this work was a trio called "Guide Me." In the musical it is sung between the young lovers Esmeralda and Phoebus and Frollo, the Archdeacon of Notre Dame.

**"GUIDE ME"**

**ESMERALDA**

GUIDE ME,  
I HAVE NEVER LOVED BEFORE.  
GUIDE ME!  
FEEL ME TREMBLE NOW THAT YOU'RE BESIDE ME.  
LET ME KNOW YOU UNDERSTAND ME.

TEACH ME.  
I HAVE NEVER LET ANOTHER REACH ME.  
LET ME SHOW YOU SOMETHING ELSE INSIDE ME.  
GUIDE ME.

I HAVE NEVER DARED TO DREAM,  
IN SUCH A WORLD AS THIS,  
WHAT DO WISHES SERVE?

FOR THIS IS MORE THAN ANY WISH,  
MORE THAN ANY DREAM,  
AND MORE THAN I DESERVE.

TAKE ME.

TOUCH ME WHERE I SLEEP INSIDE,

WAKE ME!

FREE THE LARK I KEEP INSIDE ME --

GUIDE ME!

PROVE YOU'RE THE MAN YOU SEEM!

AND PROVE TO ME THAT I DESERVE TO DREAM!

**ESMERALDA**

I HAVE NEVER DARED TO DREAM,  
IN SUCH A WORLD AS THIS,  
WHAT DO WISHES SERVE?

**PHOEBUS**

ESMERALDA,  
ESMERALDA!  
WHAT DO WISHES SERVE  
YOU NOW  
BUT --

**ESMERALDA and PHOEBUS**

THIS IS MORE THAN ANY WISH!

**FROLLO**

GUIDE ME!

**ESMERALDA and PHOEBUS**

MORE THAN ANY DREAM,

**FROLLO**

TAKE ME!

**ESMERALDA and PHOEBUS**

AND MORE THAN I DESERVE!

**FROLLO**

I DARE NOT LET YOU

TOUCH ME!

FREE ME!

**ESMERALDA**  
GUIDE ME!

I HAVE NEVER  
LOVED BEFORE

GUIDE ME!

I HAVE NEVER  
WANTED MORE!

GUIDE ME!

PROVE YOU'RE THE MAN

YOU SEEM!

**PHOEBUS**  
GUIDE --

ME! --

GUIDE --

ME!

SURELY --

I AM THE MAN

I SEEM!

ESMERALDA!

**FROLLO**  
GUIDE ME!

TAKE ME!

I DARE NOT  
SPEAK YOUR  
NAME --

SEE ME!

WAKE ME!

LET ME

UNCOVER YOU!

LET ME PROVE  
TO YOU --

I'M NOT  
THE MAN  
SEEM!

PROVE TO ME  
THAT I DESERVE

**ESMERALDA**

**PHOEBUS**

MOVE TO ME AND  
LET ME TRY TO --

**FROLLO**

TO DREAM.  
LET ME TRY TO --

PROVE TO  
ME THAT

PROVE TO  
YOU THAT

PROVE TO  
YOU THAT

EVEN I  
MAY DREAM!

EVEN YOU  
MAY DREAM!

EVEN I  
MAY DREAM!<sup>9</sup>

Lutvak's musical *Almost September*, a delightful retelling of *The Wind in the Willows* by Kenneth Graham, had its premiere on the Main Stage at St. Louis Rep. *Almost September* received eight Bay Area Critic's Circle Awards and was honored with seven Drama-Logue Awards in 1993, for its run at Theatre Works in Palo Alto, California. Lutvak's playful and imaginative wordplay are evident in this piece that is sung by Alexander the River Rat who imagines himself a poet.

**SONG ABOUT THE POEM ABOUT A RIVER**

FROM TIME TO TIME I TRY TO WRITE A POEM ABOUT THE RIVER.

GIVER? SHIVER?

BUT NOTHING WORKS, NO MATTER HOW I TRY.

IT'S TRUE I DO MAKE MY HOME UPON THE RIVER.

LIVER? SLIVER?

BUT INSPIRATION PASSES ME RIGHT BY.

OH, MY.

SOMETIMES I PRETEND MY POEM IS NOT ABOUT THE RIVER.

BUT NO MATTER WHAT, HE ALWAYS KNOWS IT IS.

I DARE SAY, I KNOW A LOT ABOUT THE RIVER.

QUIVER.

BUT ALL THE SECRETS, ALL OF THEM ARE HIS!

MAYBE I SHOULD NEVER WRITE ABOUT MY OWN EXISTENCE.

MAYBE I SHOULD WRITE ABOUT THE SEA.

MAYBE WHAT I NEED IS A LITTLE MORE DISTANCE.

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<sup>9</sup> Manuscript courtesy of Steven Lutvak

MAYBE IT'S TOO MUCH A PART OF ME.  
COULD BE.  
THIS COULD BE QUITE A SOURCE OF INSUPPORTABLE FRUSTRATION.  
WERE I TO LET MYSELF GET OVER-WROUGHT.  
BUT LIFE IS FILLED WITH THIS SORT OF COMPLICATION.  
ONE MUST LET THE RIVER FLOW, NOW THERE'S A THOUGHT!  
FLOW, BATEAU...  
ROW, BATEAU, TWO AND FRO...  
GO SLOW, UNDERTOW BELOW!!!!  
OH, NO, NO, NO...NO...  
PERHAPS I'M DESTINED NOT TO BE THE HOMER ON THE RIVER.  
GIVER! DID I SAY THAT ALREADY?  
THOUGH THIS IS MY HOME, AS I HAVE SAID.  
MAYBE I'M SUPPOSED TO BE ANOTHER RIVER LIVER.  
NOT WRITE IT.  
BUT LIVE IT. INSTEAD.  
FLIVVER?<sup>10</sup>

Further, Lutvak scored Off-Broadway's *Hannah Senesh*, garnering him a Drama Desk Award nomination, which was later produced at the Zephyr Theatre in Los Angeles. Still fresh out of his graduate studies, Steven's career began to take shape and gain momentum.

In 1989, Lutvak pursued obtaining the rights for *Kind Hearts and Coronets* for the first time. A production company named Lumiere held the rights, and seemed unenthusiastic about the project. A few years later, while still trying to engage their interest, representatives from Lumiere accepted Lutvak's invitation to attend one of his cabaret performances in Los Angeles. The performance piqued the interest of the Lumiere and they at last seemed responsive to Lutvak's concept. Following the cabaret, the representatives lavished him with praise and lauded his skills. Then they gave the rights to somebody else.

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<sup>10</sup> Manuscript courtesy of Steven Lutvak

Disheartened by his experience with Lumiere, Lutvak began devoting himself to various other projects, garnering further prestige and accolades in his field. One of the commissions he received was from the Harmony Project of the National Alliance for Musical Theater for an adaptation of a seriocomic A.R.Gurney play, *The Wayside Motor Inn*. Lutvak wrote the piece, eventually titled *The Wayside Inn*, with screenwriter Ron McGee. His work with McGee led to an appointment as an Artist-in-Residence by the Eugene O’Neil Opera Music/Theater Conference. The work is about three pairs of families who come to different hotel rooms and their difficulties in maintaining their relationships.

**“MAYBE I’VE BEEN WORKING TOO HARD”**

**JESSIE**

MAYBE...

MAYBE...

MAYBE I’VE BEEN WORKING TOO HARD,

MAYBE I’VE BEEN WORKING TOO, TOO HARD.

AND I KNOW THAT’S THE WAY THAT MAMA RAISED ME,

WORKED HER FINGERS TO THE BONE,

AND IT ALWAYS AMAZED ME,

I NEVER ONCE SAW HER RELAX.

(OF COURSE, EVERYBODY CALLED HER “THAT OLD BATTLE AXE.”)

I HOPE THAT’S NOT WHAT PEOPLE SEE

WHEN THEY LOOK AT ME –

I MEAN, I HELD HER IN THE HIGHEST REGARD!

BUT MAYBE I’VE BEEN WORKIN’ TOO HARD.

MAYBE I’VE BEEN WORKING TOO HARD,

MAYBE I’VE BEEN WORKING TOO, TOO HARD,

COULD IT BE I AM USED TO ALWAYS BEING STRESSED?

MIGHT BE GOOD TO SLOW DOWN,

TAKE OURSELVES A REST.  
HEAD OFF FOR A WEEK OR TWO,  
WHERE THE SAND IS WHITE, AND THE WATER IS BLUE.  
LYING 'ROUND WITHOUT A DAMNED THING TO DO.  
OH, THIS FEELING'S REALLY CAUGHT ME OFF-GUARD!  
MUST BE I'VE BEEN WORKING TOO HARD.  
WHEN WAS THE LAST TIME WE TOOK A VACATION?  
A REAL VACATION,  
SOMEWHERE FAR AWAY.  
BEEN SO MANY YEARS, I DON'T EVEN REMEMBER;  
SO WORRIED ABOUT WORK –  
FORGOT TO STOP AND PLAY!  
HEY!

YES, I'VE BEEN WORKING TOO HARD.  
MUST BE WHY I'M FEELING SO BATTLE-SCARRED.  
I WANT TO WALK DOWN A BEACH IN MY BARE FEET,  
LAUGH WHEN I WANT TO,  
OVEREAT!  
TAKING IN A TROPICAL BREEZE,  
SITTING ON MY ASS, DOING AS I PLEASE.  
WHO CARES WHAT IT COSTS?  
CHARGE IT TO MY CREDIT CARD!  
MAYBE I'VE BEEN WORKING --  
OOH, I HAVE BEEN WORKING,  
NO, NO, NO, THERE'S NO MAYBE~



BABY,

I'VE BEEN WORKING TOO HARD!<sup>11</sup>

In 1994, the Toronto Summer Arts Festival presented a revue of Steven's work as part of the New Voices Series produced by Garth Drabinsky and Live Entertainment of Canada. That same year, one of the Town Hall Annual Cabaret Conventions named their songwriter's night after his piece "My View of You at the Piano," which he performed with TV personality Linda Lavin.

***MY VIEW OF YOU FROM THE PIANO***

**HE (The Pianist)**

SOME WOULD THINK I MISS THE SHOW,  
SITTING AT THE PI-A-NO;  
AS THOUGH I ONLY VIEW YOU PARTIALLY.  
BUT TRUTH TO TELL MY VANTAGE POINT  
IS QUITE THE BEST SEAT IN THE JOINT:  
FOR NO ONE GETS TO SEE WHAT I CAN SEE,  
BUT ME:  
MY VIEW OF YOU FROM THE PIANO,

**SHE (The Singer)**

JUST BE CAREFUL WHAT YOU SAY!

**HE**

IS QUITE A PREPOSSESSING VIEW:  
FOR I CAN TELL FROM EVERY TOUCH YOU BRING,  
TO WHAT YOU SING,  
AND I LEARN A THING OR TWO.  
MY VIEW OF YOU FROM THE PIANO,

**SHE**

THIS IS GETTING PRETTY GOOD.

---

<sup>11</sup> Manuscript courtesy of Steven Lutvak

**HE**

IS NOT EXACTLY INDISCREET,  
AND THOUGH OBSTRUCTED,  
IT WOULD SEEM TO BE  
SURPRISINGLY  
COMPLETE.

FOR I KNOW EACH SIGH YOU BREATHE,  
AND HOW AND WHY YOU BREATHE,  
AND WHEN YOU HAVE TO SIT.  
WHEN YOU WANT IT HIGHER, OR LOWER,  
WHEN YOU WANT IT SLOWER,  
AND WHEN YOU WANT TO PICK IT UP A BIT.  
MY VIEW OF YOU FROM THE PIANO,

**SHE**

(THIS IS WHERE WE ALL CAME IN.)

**HE**

IS QUITE A TELLING ONE, INDEED,  
FOR WHEN I'M PLAYING I CAN TELL, IN FACT,  
EXACTLY WHAT YOU NEED.

**SHE**

MY VIEW OF YOU AT THE PIANO,

**HE**

*THIS* I'VE GOT TO HEAR.

**SHE**

IS ONE DETERMINED MOST BY FEEL;  
FOR I CAN TELL WITH EVERY PAUSE I TAKE,  
AND PARAPHRASE I MAKE,

AND EV'RY BREATH I STEAL --

I KNOW IT'S YOU AT THE PIANO;

**HE**

WHO ELSE *WOULD* IT BE?

**SHE**

I FEEL YOUR RHYTHMS UNDER MINE:

YOU'RE THERE IN EVERY NOTE OF EVERY SONG

AND ALL ALONG MY SPINE.

AND WHEN I PHRASE A PHRASE IN UNEXPECTED WAYS,

OR CHOOSE TO CHANGE A QUARTER NOTE TO WHOLE.....

(SHE DOES SO.)

I'M SURE MY PLEASURE SHOWS KEEPING YOU ON YOUR TOES,

AS I EXERCISE MY ULTIMATE CONTROL.

(*HE* DOES SO.)

MY VIEW OF YOU AT THE PIANO,

**HE**

MM, MM, MM, MM, MM...

**SHE**

IS RATHER COMFORTING INDEED;

FOR WHEN I TELL YOU WHERE TO GO,

I KNOW,

YOU'LL FOLLOW

MY LEAD.

AND WHEN I PRY,

**HE**

I PLAY

**SHE**

OR PRESS,

**HE**

WHILE YOU CAREEN,

**SHE**

IT'S ALMOST A CARESS,

**HE**

I MEAN

**BOTH**

I'M/YOU'RE THERE IF YOU/I SHOULD MAKE A SUDDEN STOP.

**SHE**

AND I--

**HE**

I PLUNK,

**SHE**

SHOULD THINK--

**HE**

I PLINK,

**BOTH**

WE REALLY ARE IN SYNCH,

AND THERE'S NEVER ANY QUESTION WHO'S ON TOP...

**HE**

MY VIEW OF YOU FROM THE PIANO;

**SHE**

THE WAY I VIEW YOU AT THE KEYS--

**BOTH**

THE PARTNER I ADORE SO MUCH:

WHERE ELSE COULD POSSIBLY --

**SHE**

WE RISE,

**HE**

WE SWELL,

**SHE**

WE LEAN,

**HE**

WE TRILL,

**SHE**

WE MEAN --

**HE**

WE FILL --

**BOTH**

EACH PHRASE --

**HE**

AND THEN,

**SHE**

WE FLIRT,

**HE**

WE WANT,

	<b>SHE</b>
WE HURT,	
	<b>HE</b>
WE TAUNT,	
	<b>SHE</b>
WE KILL,	
	<b>HE</b>
WE YEARN,	
	<b>SHE</b>
WE BLAZE,	
	<b>HE</b>
WE BURN,	
	<b>SHE</b>
WE DIE,	
	<b>HE</b>
WE SIGH,	
	<b>SHE</b>
WE THRILL,	
	<b>HE</b>
WE WILL,	
	<b>SHE</b>
ABUSE,	
	<b>HE</b>
AMUSE--	
	<b>SHE</b>
AMAZE--	

## **BOTH**

AND STILL,

WE NE -- VER E -- VEN TOUCH!<sup>12</sup>

Lutvak performed at the annual New Year's Eve Concert at the Cathedral of St. John the Divine in Manhattan for an audience of over 5,000 in 1997. Steven's notoriety and profile as a nationally recognized figure in the cabaret and songwriter industry rose with every year.

In 1998, Lutvak made his Carnegie Recital Hall debut as a cabaret pianist, and in 1999, reached a new echelon by debuting in Carnegie Hall with Skitch Henderson and the New York Pops. He also performed at many prestigious venues such as The Algonquin Hotel's Oak Room, the Russian Tea Room in NY, and the Gardenia Club and the Rose Garden club in Los Angeles. Additionally, Steven reinforced his prominence in the cabaret world in the late 1990's receiving three MAC Awards from the New York City Cabaret Community: one for Outstanding Singer/Instrumentalist (1998), one for Outstanding Special Material for his song "The Dinner Party" (1998), and Song of the Year for his work "Inside My Body Is A Dancer" (1994).

### **"INSIDE MY BODY IS A DANCER"**

INSIDE MY BODY IS A DANCER,  
ONE WHO IS NEVER TOUCHED BY TIME.  
WHILE I GROW OLDER IN QUITE ORDINARY WAYS,  
THERE HE ALWAYS STAYS,  
PERFECT IN HIS PRIME.

INSIDE MY BODY IS A DANCER,  
FOREVER SHARPENING HIS SKILL.  
THERE'S NO DISTRACTION NO ILLUSION;  
HE WORKS TILL HE IMPROVES,  
AND MOVES WHILE I AM STILL.

---

<sup>12</sup> Manuscript courtesy of Steven Lutvak

AND I AM DOING ALL I CAN,  
I AM KEEPING OCCUPIED.  
AND IF I'M BUSY, THEN I'M HAPPY,  
ISN'T THAT THE LINE?  
BUT ALL THE WHILE INSIDE --

INSIDE MY BODY IS A DANCER,  
ONE WHO HAS NEVER HAD TO BLAME.  
HE HAS NO CLUE TO WHO HE SHOULD OR SHOULDN'T BE;  
WHATEVER YOU MAY THINK OF HIM,  
HE GOES ON JUST THE SAME.

AND I AM DOING ALL I CAN,  
BUT WHO *IS* SATISFIED?  
I'M SORRY FOR ALL THE THINGS I CANNOT BE,  
ALL THE MEN I'LL NEVER BE,  
GOD KNOWS I HAVE TRIED.  
AND I AM DOING ALL I CAN,  
IN THE ONLY WAY I KNOW HOW.  
I'M SORRY, AND I'M TIRED OF SAYING I'M SORRY AGAIN AND AGAIN AND AGAIN,  
AND OF KEEPING THIS INSIDE:

INSIDE MY BODY IS A DANCER,  
CONTENT TO BE ALONE.  
SAFE WITHIN THE ARMS OF ONE WHO CARRIES HIM WITHIN,  
PERHAPS HE WILL BEGIN,



TO LET HIMSELF BE SHOWN.<sup>13</sup>

Other awards received included the first Johnny Mercer Foundation Emerging American Songwriter Award (1995), two Bistro Awards (2003), two Jonathan Larson Performing Arts Foundation Grants (1999, 2005) for his work in the theater, making him the first and only recipient of this honor.<sup>14</sup> Stephen Holden of the *New York Times* describes Lutvak's personal style in the following manner.

An upper-middlebrow Billy Joel crossed with a lower-highbrow Tom Lehrer with a pinch of Debussy: that's how you might place the music of the singer, songwriter, pianist and raconteur Steven Lutvak in the artistic hierarchy of contemporary songwriters.<sup>15</sup>

Although many years had passed and Steven had no problem finding new projects, his desire to make *Kind Hearts and Coronets* into a musical had not dimmed in the slightest. At that time, Lutvak was involved in two other contracts: one for *The Wayside Inn*, which had been optioned for an Off-Broadway run by Mick Leavett, had been extended 14 months and ended in nothing but legal bills. The other contract was *Campaign of the Century*, which was written with his collaborator Robert Freedman. This musical was based on the novel of the same name by Greg Mitchell and had taken 17 months to complete. *Campaign of the Century* was the winner of the California Musical Theater Competition in association with the Beverly Hills Theater Guild, and was presented in a staged reading on June 4, 2006 in Beverly Hills, LA. The production featured Tony winner John Rubinstein, Kaitlin Hopkins, Josh Radnor, Jean Louise Kelly, Stan Chandler, Corinne Kason, Michael Kostroff, Ron Orbach, Steve Vinovich, and this author. One of the characters in this piece was based on Aimee Semple McPherson, the famous Evangelical Revivalist Preacher. The following song was written for her character.

#### **"A HOMILY FROM AIMEE"**

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<sup>13</sup> Manuscript courtesy of Steven Lutvak

<sup>14</sup> Inspired by and paying tribute to Jonathan Larson, the innovative composer of the modern Broadway hit *Rent* (1994), and Off-Broadway *Tick, Tick, Boom* (1990), the Jonathan Larson Performing Arts Foundation Grants seek to aid struggling musicians with financial support so they may pursue their artistic endeavors. Larson himself received similar grants before finding success with *Rent*. Sadly, Larson's life was cut short on January 22, 1996, the date of *Rent*'s first preview on Broadway, due to complications from Marfan syndrome.

<sup>15</sup> Holden, Stephen. "From Steven Lutvak at the Duplex, True Stories in Witty Songs." *New York Times*, April 5, 2006. Accessed February 16, 2013.

**AIMEE**

AFTER PREACHING ALL LAST SUNDAY,  
I AM HERE TO TESTIFY,  
THAT NIGHT I CRAVED A GINGER ALE,  
VERY, VERY DRY.  
“DO I REALLY DARE?” I WONDERED,  
“I DO,” CAME MY REPLY.  
SO I ENTERED AND ESTABLISHMENT,  
AND FROM THE VESTIBULE,  
I SAW A MAN, A VAGRANT,  
THERE UPON A STOOL.  
FRIGHTFUL OF FACE AND SHABBY OF DRESS,  
THERE AROSE FROM HIM AN ODOR SUCH AS I COULD NOT EXPRESS.  
I TRIED TO HAVE THE HOBO TOSSED OUT OF THE PLACE,  
BUT THEN I TURNED AROUND,  
AND TO MY SURPRISE I FOUND,  
THERE WAS JESUS IN HIS FACE.  
BROTHERS AND SISTERS, THERE IS NOTHING TO FEAR,  
SISTERS AND BROTHERS, JESUS IS HERE.  
HE’S IN YOUR NEXT DOOR NEIGHBOR,  
BE HE BUM OR FINANCIER,  
WHATEVER YOU MAY SAY,  
WHATEVER YOU MAY DO,  
DON’T FORGET THAT JESUS IS THERE INSIDE OF YOU.  
I WAS WALKING HOME FROM CHURCH ONE NIGHT,  
TO ENJOY THE EVENING AIR,  
AND I ASKED GOD, “AM I WORTHY? HAVE I DONE MY SHARE?”  
I HEARD THE CRICKETS SINGING IN ANSWER TO MY PRAYER,

THOUGHT I,  
"WE'RE ALL OF US GOD'S CREATURES,"  
BUT MY REVERIE WAS SHORT,  
FOR FROM A BAR A CREATURE STUMBLED,  
OF QUITE A DIFF'RENT SORT,  
HER FACE WAS OVER PAINTED, HER BOSOM INDISCREET.  
FROM THE GIN AND CHEAP PERFUME,  
I SMELLED A WOMAN OF THE STREET.  
TO SAY I WAS OFFENDED IS TO UNDERSTATE THE CASE.  
LIKE YOU, MY FIRST REACTION WAS TO KICK HER IN THE FACE.  
I WANTED HER TO KNOW SHE WAS ALL THAT I DESPISE,  
BUT SHE GOT UP FORM THE GROUND,  
AND TO MY SHOCK I FOUND,  
THERE WAS JESUS IN HER EYES.  
BROTHERS AND SISTERS, THERE IS NOTHING TO FEAR,  
SISTERS AND BROTHERS, JESUS IS HERE,  
HE'S IN YOUR FAM'LY DOCTOR, IN YOUR GROC'RY STORE CASHIER,  
IN YOUR SISTER'S SECOND HUSBAND THOUGH HE'S CRASS AND INSINCERE.  
HE'S EVEN IN YOUR MOTHER,  
THOUGH YOU SEE HER ONCE A YEAR.  
WHATEVER SHE MAY SAY,  
WHATEVER SHE MAY DO,  
WHATEVER KIND OF HELL IT IS SHE MAY HAVE PUT YOU THROUGH,  
JUST REMEMBER JESUS,  
IS THERE INSIDE OF YOU.  
IF YOU THINK YOUR LIFE HAS GONE FROM BAD TO WORSE,  
JUST WAIT UNTIL YOU HEAR MY FINAL VERSE.  
I AWOKE IN BED ONE MORNING,

EVER GLAD TO GREET THE DAWN.  
I HAD LEFT MY BIBLE OPEN TO MY FAV'RITE VERSE OF JOHN.  
"LET HE WHO IS WITHOUT SIN, BLAH, BLAH, BLAH."  
BUT AS I BEGAN TO READ HIM,  
MY EYES FELL UPON (GASP)  
A FIGURE IN THE DOOR,  
IS THAT A SHADOW OR A MASK?  
"YOU'RE IN A LADY'S BEDROOM!"  
I TOOK THE MAN TO TASK.  
I REACHED FOR MY REVOLVER, AND I AIMED IT FOR HIS HEAD.  
IF I HAD TO, I WOULD SHOOT HIM DOWN TO KEEP HIM FROM MY BED.  
BUT THEN I THOUGHT OF JESUS,  
AND I LOOKED ALL AROUND.  
UP AND DOWN AND SIDEWAYS,  
CHRIST WAS NOWHERE TO BE FOUND.  
I SHOOK! I QUAKED!  
I TREMBLED, UNCONTROLLABLY,  
THEN SUDDENLY REMEMBERED,  
THERE'S JESUS HERE INSIDE OF ME.  
THE MAN KEPT MOVING CLOSER,  
AND CAME INTO THE LIGHT.  
MY DECISION NOT TO MURDER HIM, I COULD SEE WAS RIGHT.  
IN THE DARKNESS HE WAS VICIOUS, SWARTHY,  
OH, YOU KNOW THE TYPE,  
BUT I SAW HE WAS MY PLUMBER,  
THERE TO FIX MY LEAKY PIPE.  
BROTHERS AND SISTERS, THERE IS NOTHING TO FEAR,  
SISTERS AND BROTHERS, JESUS IS HERE.

HE'S IN YOUR LATIN POOL BOY,  
IN YOUR WEALTHY RACKETEER,  
HE'S IN THAT HELPFUL SCHOOLBOY,  
IN THE SAILORS AT THE PIER,  
HE'S EVEN IN THE POLLACK WHO INSTALLED YOUR CHANDELIER.  
WHATEVER WE MAY SAY,  
WHATEVER WE MAY DO.  
WE'RE NO MATCH FOR JESUS,  
HE'S INSIDE ME AND YOU,  
AND YOU, AND YOU,  
AND EVEN YOU!  
JUST REMEMBER JESUS  
IS INSIDE ME AND YOU! JESUS!<sup>16</sup>

After three daunting and arduous years of dedication to completing the two projects, Lutvak was left without a production or licensing deal for either one. Meanwhile, one day, while he was taking a yoga class, the yoga teacher asked everyone, "What would you like to dedicate the class to?" Steven's frustration with both projects lingered in his mind as the teacher's question echoed in his ears: "What would you like to dedicate the class to?" Lutvak responded:

I want to dedicate this to a project that will be mine, that I can see to fruition. And I always say, and this is embarrassing, but I will say, it's as if I heard a voice that said, "Now you'll get the rights to *Kind Hearts and Coronets*."<sup>17</sup>

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<sup>16</sup> Manuscript courtesy of Steven Lutvak

<sup>17</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

## CHAPTER 2

### KIND HEARTS AND CORONETS

With a distinguished profile and accomplished reputation, Lutvak resumed his endeavor to obtain the rights to *Kind Hearts and Coronets*. Steven contacted the copyright agency of Thomson Reuters in Washington D.C. and was about to proceed when an acquaintance said to cancel the search and that she would help Steven find the information on the Internet. With her aid, Lutvak was able to track down the information which indicated that the rights no longer belonged to Lumiere, but to a French cable conglomerate, the Canal + Group. Fortunately, Steven is fluent in French, and called the company directly to inquire into attaining the rights to *Kind Hearts and Coronets*. After being led through the corporate bureaucracy of Canal+, Lutvak at last made contact with a Canal+ representative dealing with copyright and licensing, Ron Halpern. During their conversation they discussed *Kind Hearts and Coronets*, and Steven's concept for adapting the film successfully into a musical. Ron Halpern posed very specific questions to Steven, believing the film to be one of the company's top properties in terms of musical adaption.

Lutvak forwarded some of his compositions to Halpern for his review. The materials Steven sent included the CD recording *The Time It Takes* which included the song "The Dinner Party," which had earned Lutvak one of his three MAC Awards. After a short period of time Steven called Mr. Halpern back to follow up.

#### **"THE DINNER PARTY"**

I WAS AT A DINNER PARTY JUST A COUPLE OF WEEKS AGO;  
ALL THE GUESTS WERE CHIC AND/OR HIGH-POWERED.  
THE REPARTEE WAS BRISK  
THROUGHOUT THE LOBSTER BISQUE,  
AND THE SALAD COURSE, COMPLETELY NOEL COWARD.

BUT THEN THE CONVERSATION TOOK AN UNEXPECTED TURN,  
AND HEADED WHERE I FRANKLY THOUGHT IT NEEDN'T;

AS ONE BY ONE EACH GUEST  
DID HIS VERY LEVEL BEST  
TO TALK ABOUT HIS FAVORITE ANTECEDENT.

AS THEIR RELATIVES HAD BEEN  
WHERE MINE HAD NEVER BEEN,  
THIS WAS A TOPIC TO WHICH I COULD FIND NO ENTRY.  
THEY SPOKE OF DUCHESSSES AND LORDS,  
BARONS BY THE HOARDS,  
FAVORITES OF SEVERAL KINGS  
WHO'D REAPED THEIR SWEET REWARDS:  
SEVERAL SAILED THE MAYFLOWER,  
SEVERAL WHO'D OWNED FJORDS --  
AND WE HADN'T EVEN HIT THE EIGHTEENTH CENTURY.

BUT WITH A STARTLING PATE,  
(WHICH WAS LOVELY, BY THE WAY,)  
A MOST ALARMING HUSH FELL ON THE TABLE.  
MY HOSTESS SMILED, "AND YOU?  
WHAT DID YOUR FAMILY DO?"  
I GAVE THE BEST REPLY WHICH I WAS ABLE.  
AND WHICH, I SWORE, AS ABSOLUTELY TRUE.

WE WERE BAGEL MAKERS TO THE CZAR.  
THE LINEAGE GOES BACK VERY, VERY, VERY FAR.  
I THINK IVAN WAS THE ONE,  
WHO, WHEN FED UP WITH THE BUN,  
SENT HIS MEN IN SEARCH OF SOMETHING STARCHY AND BIZARRE.

THEY CAME UPON MY UNCLE,  
WHO HAD RECENTLY SOLVED THE RIDDLE,  
OF HOW TO MAKE A ROLL WITH A HOLE IN THE MIDDLE.  
HE SERVED THEM FRESH TO IVAN'S COMMISSAR:  
AND WAS THUS NAMED BAGELMAKER TO THE CZAR.

IT'S TRUE.  
WE WERE BAGELMAKERS TO THE CZAR,  
IN THE LAND OF SOUR CREAM AND CAVIAR.  
LATER OLGA, IT IS SAID,  
NEVER EVEN *TASTED* BREAD;  
AND HER MOTHER, THE TSARINA  
WOULD NOT GET OUT OF BED,  
WITHOUT A TOASTED ONION WITH SOME UNEXPECTED SPREAD:  
WHICH ADDED TO HER MIDDLE, BUT DID WONDERS FOR HER HEAD.  
OH, THE THINGS YOU LEARN ABOUT WHICH MUST REMAIN UNSAID --  
WHEN YOU'RE BAGELMAKER TO THE CZAR.

I REALIZED IN A FLASH THAT SINCE I'D BEGUN TO SPEAK,  
ALL EARLIER CAMARADERY WAS GONE.  
THEIR EVERY JAW WAS SLACK,  
THEY WERE TAKEN SO ABACK.  
I REALLY HAD NO CHOICE, BUT TO GO ON:

WE WERE BAGELMAKERS TO THE CZAR,  
WHO WOULD GIVE US EVERY YEAR ANOTHER... SAMOVAR:  
AND IT WAS CATHERINE THE GREAT,  
THAT OVER-ZEALOUS HEAD OF STATE,



WHO FED SOME TO HER HORSE,  
BUT THAT OF COURSE, FOR HER, WAS PAR.  
AND LITTLE ANASTASIA,  
COULD NEVER GET HER FILL:  
THERE ARE THOSE WHO SAY  
THAT YET TODAY,  
SHE'S SNACKING ON THEM STILL:  
BUT THAT IS TAKING THINGS A LITTLE BIT TOO FAR --  
FOR EVEN BAGELMAKERS TO THE CZAR.

BEFORE THE HAMMER AND THE SICKLE,  
WE WERE THERE WITH PUMPERNICKEL,  
THE THINGS WE DID WITH POPPY --  
EVERYONE UNSUCCESSFULLY TRIED TO COPY.

WE WERE BAGELMAKERS TO THE CZAR.  
AND NO ONE EVER LEARNED THE SECRET OF OUR SCRUMPTIOUS  
REPERTOIRE.  
BUT OF COURSE, IT COULDN'T LAST,  
FOR LIKE ALL EMPIRES OF THE PAST,  
WHO REACH THEIR INEVITABLE FINALES:  
AND WHEN THE REVOLUTION CAME,  
WE VERY SLIGHTLY CHANGED OUR NAME,  
TRAVELED NORTH,  
AND MADE A FORTUNE IN BIALYS.<sup>18</sup>

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<sup>18</sup> Manuscript courtesy of Steven Lutvak

“The Dinner Party” was a wonderful choice for selling Steven’s talents for the project, perfectly demonstrating his dexterity and genius with lyrics and his skills at rhyming. “The Dinner Party” also showcased Steven’s playful sense of humor and intelligent wit, all essential qualities for the musical comedy style Lutvak hoped to achieve with his adaptation of *Kind Hearts and Coronets*. After forwarding his materials to him, Steven faced difficulty in contacting Halpern on the phone. Steven’s perseverance was rewarded when he finally contacted Halpern, who immediately mentioned how he thoroughly enjoyed “The Dinner Party.” By the end of their conversation Lutvak recalls saying “If I am lucky enough to get the rights to do this....” Mr. Halpern broke in with ‘It would be churlish of me not to give it to you with this kind of enthusiasm.’ It was at this point, cool professional that I am, I started crying. I don’t think he knew that.”<sup>19</sup>

On April 1, 2003, not long after Steven and Mr. Halpern had discussed “The Dinner Party”, Canal+ sent a contract granting permission to Lutvak to adapt the film *Kind Hearts and Coronets* into a live stage musical. The contract that arrived included some peculiar provisions: what is called in the industry a “Free Option Contract”, which centered around the idea that Canal+ would provide Steven the exclusive rights to adapt the film into a live stage musical. Steven’s option would last through October 1, 2004, when the writers would then be required to have all of the materials for the adaptation finished and ready to be presented to Canal+. At that point the company would have the sole rights to present the musical featuring Lutvak’s work. If Canal+ decided they were not interested, then the writers had one more year in which to find another producer for the piece, and these producers would have to be agreed upon by Canal+. If after the second year, these terms were not met, the writer’s right to the adaptation would be terminated. Further, the contract didn’t require any money for the rights up front, but it gave Canal+ a great deal of control over the possible adaptation.

Canal+ pre-approved Steven’s choice of collaborator, his graduate school companion Robert Freedman, who had just written a Judy Garland movie series called “*Life with Judy Garland: Me and My Shadows*,” produced by ABC. The *Kind Hearts and Coronets* adaptation wasn’t the first time, post-college, that the duo had teamed up, having received a joint

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<sup>19</sup> Related to author February 15, 2015.

commission in 2002 from the American Musical Theater of San Jose to write the musical *Campaign of the Century*. Lutvak and Freedman were then invited by Sundance Institute's Theater Laboratory to participate in the Writer's Retreat at the Ucross Foundation in Wyoming and continue their work on *Campaign of the Century*. The piece went on to be presented at the New York Music Theater Festival, and was designated to be the closing event at the 2004's Chicago Humanities Festival.

Realizing from the beginning that they were on to something very special, Robert and Steven set about writing their musical version of the film *Kind Hearts and Coronets*. At that time, Lutvak and Freedman had one month to create six songs and a finished script, which could then be presented to Canal+ for a first review. They wrote very quickly, but successfully. Lutvak even went into a recording studio and created tracks of himself singing his compositions in all registers, so that he might hear and analyze the harmonies. The pieces seemed to be falling into place as the deadline arrived for their first presentation to Canal+.

Lutvak and Freedman wrote the first song for their original adaptation of *Kind Hearts and Coronets* for the central female character, Sibella. It became one of the only numbers to remain unchanged during the show's lengthy road from process to production. When the audience first meets Sibella, they meet a vain, pretentious and calculating girl who wants nothing more than to marry someone with money so that she may advance her station in life. She finds the attentions of Monty Navarro pleasing and amusing enough, and encourages him, but she has no intention of truly considering Monty as a husband. Steven and Robert struck upon the perfect manner of vocalizing her social strivings by voicing her with a waltz. The musical handling of the waltz and the extreme cleverness of Steven's lyrics illustrate with crystal clarity the nuance of her character. Reading the libretto of *Gentlemen's Guide to Love and Murder* one certainly understands how Lutvak and Freedman merited awards (Kleban and Ebb) for their lyric/songwriting. The words are precise and the rhyming is impeccable and never predictable.

**“I DON’T KNOW WHAT I’D DO WITHOUT YOU”**

**SIBELLA**

DON'T YOU JUST LOVE ME IN PINK?

WOULD YOU, PLEASE?

MAYBE A FLOWER FOR MY HAIR?

NO. NO. YES! NO.

VIOLET? NO, ATTAR OF ROSES, I THINK. LOOK, YOU BROUGHT ME CHOCOLATES!

OH, NO, I DON'T DARE.

DO YOU HATE THESE EARRINGS?

THE TRUTH, DON'T BE KIND. I DON'T MIND,

BECAUSE I HATE THEM, TOO. NO, NO, NO, DON'T SQUEEZE. MONTY, YOU'RE A TEASE.

OH, MONTY, LOOK, MY SHOE!

I DON'T KNOW WHAT I'D DO WITHOUT YOU!

I HAVE NEVER MET ANOTHER MAN

WHO'S HALF AS DEAR AS YOU. YOU'RE SO CLEVER, TOO. AND YOU MAKE ME LAUGH

MORE THAN ANYBODY.

WHY ARE OTHER MEN SO DREARY, MONTY, AND SO DEADLY DULL?

NO ONE HOLDS A CONVERSATION

HALF AS BEAUTIFULLY AS YOU!

YOU HAVEN'T SAID A WORD ABOUT MY DRESS!

YOU'RE A BRUTE!

SEE HOW IT MOVES WHEN I TURN? TWO-THREE-ONE-TWO.

IT'S A BIT MUCH FOR CLAPHAM,

BUT NEVERTHELESS.

MAYBE JUST A BITE,

JUST TO BE POLITE,

MONTY, THAT'S TOO TIGHT,

MONTY, THAT'S JUST RIGHT.

OH, WHAT I PUT YOU THROUGH!

I DON'T KNOW WHAT I'D DO,

I DO NOT HAVE A CLUE,

I DON'T KNOW WHAT I'D DO WITHOUT YOU!<sup>20</sup>

About the song, Lutvak remarked, "What I thought was, it's a little bit of a cheap waltz. Though she thinks of herself as elegant, it is a little cheap."<sup>21</sup>

The showcase of the script and songs for Canal+ was called, for presentation purposes, "Eight Musical Moments from *Kind Hearts and Coronets*". Lutvak gathered a group of performers including Raul Esparza, Nancy Anderson, Rebecca Luker and Sean Allen Krill for a 29- hour reading.<sup>22</sup> Typically in a presentation such as this, the actors are rehearsed, the presentation is given, and then a studio recording is made. Steven, having experienced the work ethic and ego of actors, decided to do the recording first.

Because of actor's egos, they want to get it right for the recording, which means they will learn it more accurately than if they were only learning it for the presentation. It turned out to be a very smart thing to do.<sup>23</sup>

While Lutvak and Freedman were creating the show and readying it for the presentation, Robert's agent was busy trying to get the word out about what she considered to be the "best musical she had represented in 10 years" and set up potential producers to come and hear the work. One day, while in the recording studio, Lutvak got a call from his agent at the time reporting that Richard Garmise, the American agent representing Canal+, was infuriated having discovered the list of the producers attending the reading. Garmise required that Canal+ approve the material before its presentation to any producers. Garmise's mandate came as a shock to Steven and

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<sup>20</sup> Manuscript courtesy of Steven Lutvak

<sup>21</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

<sup>22</sup> A '29-hour reading' is an industry term for a staged reading adhering to the "Stage Reading Guidelines" of the Actor's Equity Association, the Union of Professional Actors and Stage Managers. Under the Guidelines, actors are only permitted to participate a maximum of 29 hours; actors must work with a book in hand; any use of sets, props, wigs or make-up is not allowed; no admission can be charged or donations solicited; no advertising, photography, or filming is allowed; and the number of Readings is restricted to three in a one-month period. ("Stage Reading Guidelines", Actor's Equity Association)

<sup>23</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

Robert, as the contract did not state that Canal+ required such approval before an industry reading, and this requirement defied the theatrical norm. In Lutvak and Freedman's previous experiences, as in most production processes, potential producers are encouraged to attend the reading of a new work.

I think the reason they hit the ceiling was that, suddenly, people were coming to see the material that they had never seen. But they never said, "show it just to us." But again at a certain point, these things become machines. You know, there's sort of no stopping this.<sup>24</sup>

In order to appease Canal+, Steven's agent set about uninviting major Broadway producers, (a disconcerting venture to say the least) to satisfy and accommodate Garmise. The first presentation in association with the Dramatists Guild was performed on October 1<sup>st</sup>, 2004. Involved in the production at the time were such well known musical theater performers such as Nancy Anderson (who was known for her performances on Broadway in *A Class Act* and *Wonderful Town*), Raoul Esparza (who had appeared on Broadway in *The Rocky Horror Show*, *Cabaret* and *Taboo*) and Rebecca Luker, (a Broadway veteran with performances including *The Phantom of the Opera*, *The Secret Garden*, *The Sound of Music*, *Show Boat*, *The Music Man* and *Nine*). Also involved in the project were Sean Allan Krill (*Thoroughly Modern Millie*, *Mamma Mia*, *On A Clear Day You Can See Forever*) and James Warwick (*An Ideal Husband*, *Camelot*, *The Rocky Horror Show*). The presentation was a huge success and received a standing ovation. Following the presentation, Richard Garmise approached Lutvak on the verge of tears saying "I haven't heard music like this in forever" and then "Ron has some notes." Ron Halpern, the head of the division of Canal+, had flown in from Paris, and would be flying back immediately, which required the reading to be scheduled meticulously to accommodate his schedule. According to Lutvak, Halpern sat through the entire presentation completely unresponsive with his arms folded across his chest. Canal+ convened a conference to discuss their feelings about the presentation with the authors. Primarily, Halpern voiced that he didn't feel the comedy and style were subtle enough, making the work seem overplayed. In particular, Sibella's number, according to Halpern,

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<sup>24</sup> *Ibid*

did not bear any similarity to the corresponding character in the film. From his first experience viewing the presentation Halpern seemed skeptical about the project.

Mr. Halpern's hesitations, however, were more complex than a lack of similarity to the film owned by Canal+, as this was not the only film to stage project the company was considering. Ealing Studio's produced *Kind Hearts and Coronets* in 1950, a time when Ealing Studios produced many similar obscure British comedies, most of which starred Alec Guinness. One of these comparable films produced by Ealing Studios, titled *The Man in the White Suit*, was another optioned property owned by Canal+. The producers had optioned *The Man in the White Suit* and hired Mark Hollman and Greg Kotis, who were enjoying the success of their recent Broadway hit *Urinetown* and were now in high demand in the industry, to adapt *The Man in the White Suit* for the stage. Lutvak and Freedman eventually learned that on the same weekend of the presentation of their adaptation of *Kind Hearts and Coronets*, Halpern and his team had attended a presentation of Hollman and Kotis' adaptation of *The Man in the White Suit*, which had evidently not been positively received by the team. Lutvak comments

Ron Halpern was beside himself because this (*The Man in the White Suit*) was the property they were moving forward with, and all of a sudden (*Kind Hearts and Coronets*) leapfrogged ahead of them. I wonder if he was unhappy because he had lost control. That's about as much as I can understand about all of this.<sup>25</sup>

The year 2005 brought two more presentations of Steven and Robert's stage musical version of *Kind Hearts and Coronets*, both sponsored by the Dramatists Guild and this time starring Nancy Anderson, Raoul Esparza, Melissa Errico and Malcolm Gets. These later presentations received the same sort of promising response, but no producer stepped forward. At one point, there was discussion of recruiting Martin Short to play the star role portrayed in the film by Alec Guinness, specifically the eight family members turned victims. Although Short liked it the project, he passed on it in favor of another piece he had already begun work on. Lutvak and Freedman persevered, continuing to write and fine tune until April 2006 when they received an invitation to Huntington Theater's Breaking Ground Series to present their adaptation of *Kind Hearts and Coronets*. Involved in this reading were: Douglas Sills, Nancy Anderson, Jill Paice,

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<sup>25</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

Marilyn Caskey, Price Waldman, Jonathan Hadley, and this author. Ron Halpern and Richard Garmise of Canal + received an invitation to this presentation, but did not attend. The Huntington presentation was another resounding success, leaving Steven and Robert feeling very confident about their material and the responses it garnered. Not only were Lutvak and Freedman confident about the feedback they received, but they began receiving recognition and awards for the music and lyrics associated with their adaptation. In 2006, Steven and Robert won the prestigious Kleban Award (for Lyric Writing for the Theater) and the Fred Ebb Award (Songwriting for the Theater). Their acceptance marked the first time that a single team had ever been presented with both awards in the same year. Also in 2006, the Jenness and Velsey book, *Classic American Popular Song: The Second Half-Century, 1950-2000* was released, and Steven's work, including musical style and genius with lyric was addressed,

Lutvak uses a mixture of rhyme and assonance here[*The Dinner Party*], as in other songs, and he likes to prolong a thought...his lyrics are dense, technically deft, and true. *The Dinner Party* (1998) is a Noel Coward creation, if Coward had been in New York and Jewish.<sup>26</sup>

Then came the game changer. Lutvak and Freedman received another invitation showcase and work on their adaptation, this time at the Sundance Institute Theater Laboratory. Acceptance to The Sundance Institute represents an impressive honor in the industry, particularly for a musical. Previous musicals that were work-shopped and developed at the Sundance Institute before progressing to Broadway include *Spring Awakening*, *Grey Gardens*, as well as the play *I Am My Own Wife*. Lutvak and Freedman hadn't even applied for the program; they simply received a call asking if they would like to participate.

The duo trekked off to Sundance in July of 2006, along with a cast directed by Ron Lagomarsino which included: Robert Petkoff, Nancy Anderson, Raoul Esparza, Judy Kuhn, Price Waldman, Jordan Gelber, Whitney Bashor, Roderick Hill, Judy Blazer, and this author. Typically, producers are not permitted to attend the workshops at Sundance, but Steven's agent managed

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<sup>26</sup> David Jenness and Don Velsey, *Classic American Popular Song: The Second Half-Century, 1950-2000* (New York:routledge, 2006), 324



to acquire an invitation for Halpern and Garmise of Canal+. Once again, they did not attend the presentation.

At the beginning of the Sundance experience, Will Chase had been cast to play the role of the murdering protagonist, Louis. Five days before the starting date, Chase called to inform the team that he would not be able to participate for personal reasons and had to be replaced. The team called in the very talented actor Robert Petkoff, a well-known and highly respected actor specializing in Shakespearean roles in the US and London. From Petkoff's first delivery the team realized they had made a wonderful choice, particularly considering he had learned eighteen songs in three days. Up until this point in the show's history, Raoul Esparza had been playing the roles comprising "the D'Ascoyne Family", which had shot Alec Guinness to fame. Sundance made it evident to Esparza that though he was the star of the show, he was not the lead. Raoul's realization was noteworthy for its influence on the unfolding events and transactions as Steven and Robert's adaptation moved forward. Lutvak remembers

Robert (Petkoff) read one line, and Nancy's head and mine spun to one another and we went, "Oh my god, we've got a wonderful actor here. And the more wonderful he became, the quieter and quieter Raul Esparza was. Until the end of the reading Raul came up to me and said, "I'm not your guy, I have to go home. This is not the kind... So I channeled my best Celeste Holm and said, "Raul, there is nobody else who could play this part and I know this will be your Tony Award. This will be your second Tony Award after "Company" (which was starting a few weeks hence).<sup>27</sup>

*Kind Hearts* was the hit of the season at Sundance that year, although Garmise and Halpern had not attended. After the feedback they received from the Sundance presentation, Lutvak and Freedman spent some time making a few adjustments to the script and began to think about putting together a presentation in New York to find producers. After Sundance, the adaptation gained interest from multiple potential producers, including Darryl Roth who expressed a desire to produce a reading of the show at Manhattan Theatre Club. Performing simultaneously in *Company* on Broadway, Esparza lamented being vocally taxed between the two shows, leading to a dialogue between Steven, Robert and Raoul's agent. Reaching a compromise with Esparza, the writers managed to confirm a time in January, 2007 and scheduled the presentation.

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<sup>27</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

By now, the show was long past its October 2004 due date. During this time, an old friend of Freedman's, Susan Cartonis (most notably a producer of the Mel Gibson movie called *What Women Want*) and her good friend Bob Greenblatt (the then President of Showtime), decided to produce the show. Simultaneously, Richard Garmise had landed in New York and reportedly heard from Esparza's agent that Esparza was not completely committed to *Kind Heart and Coronets* which included being dissatisfied with Freedman as a writer. Accordingly, Richard Garmise cancelled the scheduled reading and instead scheduled a conference call including Raoul, his agent, his manager, Richard Garmise and Ron Halpern, excluding Lutvak, Freedman, and both of their respective agents.<sup>28</sup> This move by Canal+ was interesting in that legally, they had no standing to fire Freedman. Despite having licensed the material to Steven, contractually Canal+ were not the producers of the show, and could not make such decisions. Canal+ kept treating Steven and Robert's adaptation as if it were a movie studio project, and still their property, and purported to be within their rights to make these sorts of changes.<sup>29</sup>

After meeting with Esparza and his agents and hearing all of Esparza's complaints and perceived problems with the show, Canal+ decided the show simply wasn't working. The Canal+ team requested a meeting between Steven and his agent and Robert's agent to discuss firing Robert. Scheduled for a surgery, Lutvak attempted to play off the operation as an emergency surgery, in an effort to postpone or cancel the meeting. His attempt failed. Meanwhile, Bob Greenblatt's lawyer, John Breglio, the former head of the entertainment department agency White Suit (and whose representation was prolific in the industry having worked with artists ranging from Michael Bennett to Stephen Sondheim), contacted Richard Garmise with an offer by Bob Greenblatt to purchase the adaptation rights for *Kind Hearts and Coronets*. Greenblatt's offer engendered an enormous conference call including the Canal+ team, Lutvak, Freedman and their respective agents. During the call the group reached the consensus that Bob Greenblatt would produce the Broadway run of *Kind Hearts and Coronets*. Soon, however, Richard Garmise began pushing deadlines, adding demands and changing the conditions of the contract. Garmise

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<sup>28</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

<sup>29</sup> *Ibid*

continued this behavior for approximately 9 months. Lutvak and Freedman found themselves in a unique situation: typically in the production process, by the time a producer options a finished work, the producer deals solely with the authors and agents. Garmise, however, defied convention, forcing Greenblatt, the president of Showtime and a successful and experienced producer, to deal with the ever-changing and unreasonable demands of the outlying rights holder, Canal+. Finally after the months of back-and-forth negotiating, Bob Greenblatt decided he could not do business with Garmise, and so the deal was off.

I mean I think that philosophically, they were never going to see eye to eye. Bob Greenblatt's attitude was if I'm paying for an option on something, it's mine to do with as I choose. And their attitude was this is the crown jewel of our catalogue, we have to stay involved.<sup>30</sup>

Not only had the interference of Richard Garmise cost them the deal with Greenblatt, there had also been another opportunity to have a presentation by Darryl Roth at Manhattan Theatre Club. The artistic director of The Old Globe Theatre in San Diego (which had been set to do the show with Bob Greenblatt) called Garmise saying they were still interested, but he too changed his mind, after finding negotiations with Garmise difficult to impossible after two conversations.

Lutvak was desperate to find a way to make things work. He flew to Paris to meet with Ron Halpern one last time and plead his case.

Ron Halpern said, "Look, this book doesn't work." And I said, "With all due respect, it's a musical. And you can't tell, I know you're a wonderful reader of scripts, but nobody in the theater believes they can tell what a musical is until you've actually, until you've seen it. Because it's all about rhythm and you have to hear it. And he said, "Well, if it's any good, why don't we have a producer?" And one of my regrets is not having said, "Because you haven't let us show it to anybody."<sup>31</sup>

Lutvak left Paris feeling very distressed as during this meeting with Halpern, Richard Garmise had also continued to be difficult and disparaging of the work. Garmise's objections now included saying the material for the show was over-exposed. Steven felt that since the musical had only been presented twice in its entirety (once in Boston at The Huntington and once at

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<sup>30</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

<sup>31</sup> *Ibid*

Sundance), it's being over-exposed was an odd remark indeed. Garmise's behavior could also be considered strange when after four years, even with all the extensions on the project, he had created stumbling block after stumbling block for the project. Throughout this process, Garmise never actually said "no, this project isn't going to work," he just kept going along letting everyone believe it would turn out in the end.

Ever tenacious and feeling undeterred, Lutvak returned from Paris and arranged a meeting with the late Gerry Schoenfeld (who was 84 at the time), the head of the Shubert Organization and the most powerful man on Broadway, in order to show him the material for the show and explain the situation." Lutvak was able to set up a presentation for Schoenfeld (and Schoenfeld only) at the Laurie Beechman Theater to present his work. This presentation was done with a very small cast including Robert Petkoff, Price Waldman, Nancy Anderson, Catherine Walker and myself-- a presentation that Schoenfeld later said was arguably the best presentation of a musical he'd ever seen and immediately offered his help). Schoenfeld wanted to call Richard Garmise directly to devise a solution, but Steven felt that would be too confrontational. Instead, Lutvak and Schoenfeld discussed the idea of putting together an unsalable consortium of producers and presenting the impression to Canal+ that *Kind Hearts and Coronets* had strong interest and support within the industry. Lutvak left his meeting with Schoenfeld feeling comfortable with the new plan moving forward and the knowledge that Schoenfeld and Steven's lawyer would be in touch the next morning. Unfortunately, Schoenfeld decided (because he was the most powerful man on Broadway and needed to wait for no man) to call Richard directly the next day. Schoenfeld's call to Garmise led to a furious call from Garmise to Steven's agent during which he claimed: "We pulled the rights on you people, why are you continuing to show this?" Lutvak and Freedman were in shock; the phone call was the first time they had heard that Canal+ had pulled the rights to *Kind Hearts and Coronets*, and their agents had never been informed of it. At that time, Richard Garmise and the Canal+ team elected to send Steven and Robert a Cease and Desist Letter.

After receiving this vitriolic letter, Lutvak called his attorney and asked what action they could take to continue the project. Gil Karson, Steven's lawyer, informed Steven that they should

argue that *Kind Hearts and Coronets* is based on a public domain novel published in 1907: *Israel Rank: An Autobiography of a Criminal*. Karson advised that Lutvak should meet with an intellectual property attorney. Karson arranged a meeting with Steven and Barry Slotnik, of Loeb & Loeb, a law firm containing an established theater office. At the meeting, Slotnik, having received the information regarding the case, explained:

So you want to write a musical based on *Israel Rank*, which happens to be the book on which "*Kind Hearts and Coronets*" is based." I [Steven] said "Yes, that is correct." He [Slotnik] closed his folder and said "Gay Ga Zinta Hate" which is a Yiddish phrase that interpreted means "go and be healthy." I said, "Is that it? He replied, "In essence? Yes. Of course it's more complicated than that. But in essence, are you legally allowed to do this? Yes." I said, "Including having one actor play multiple parts?" He said, "This is not a copyrightable idea, you are fine. Now, it's more complicated than that because I know these people and they will come after you. But I think they'll settle."<sup>32</sup>

After their initial meeting with the Slotnik, Lutvak and Freedman requested an opinion letter from Barry Slotnik, at the cost of \$40,000. An opinion letter, or official document which lawyers state their advice on record for their client's official use, serve a variety of legal and official functions and are regarded seriously in corporate and legal affairs. The costs result from the firm necessity to support the document on behalf of their client, including fielding any external calls or concerns regarding the opinion and the document itself. Lutvak procured the letter in an effort to assuage the fears of potential producers, illustrating the strength of their legal case in moving forward with their adaptation of *Israel Rank*. In Steven and Robert's case, the attorneys of both potential producers and potential venues examined the document to assure that involvement with Steven and Robert's adaptation would not present a legal liability down the road. Glenn Close had seen the presentation of the *Kind Hearts and Coronets* at Sundance and offered to host an evening of CEO's at her house to meet Lutvak and hear about his project. The interest garnered at this evening event raised \$25,000 towards paying for the opinion letter.

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<sup>32</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

## CHAPTER 3

### THE TRUTH ABOUT MONTY

#### I. THE REWRITE

The writers felt secure in their copyright status and began to make the necessary changes in the script to convert the project into an absolute adaptation of *Israel Rank*, eliminating any traces of the differences found in *Kind Hearts and Coronets*. All creative elements, as well as any additions and edits to the script, required thorough scrutiny to deconstruct their origin, analyzing whether or not the creative element derived from the novel or the film. Everything had to be taken apart and face approval from Slotnik, insuring that no element of the new production infringed upon an idea or conceit created for the film. One of the first changes to the script was the name of the aristocratic family at the center of the plot. The novel labels the family Gascoigne, and the film titles the family D'Ascoyne. Lutvak and Freedman had written a song called "Why are all the D'Ascoyne's Dying?" the alliteration providing the basis of humor for the number. Not wanting to lose the alliterative humor by changing the lyric to "Why Are All the Gascoigne Dying?" to match the novel, Steven and Robert resolve to create an entirely original name for their adaptation, one which would maintain the "D" required for the alliteration featured in the number. After weeks of deliberation, the pair settled on the family name of D'Ysquith.

The name D'Ysquith itself is funny because it is so ridiculous. Ironically, I think the leap from the adaptation of the film to the adaptation of the book actually had made the show better. It's tighter and it's funnier because suddenly we were free.<sup>33</sup>

#### **"WHY ARE ALL THE D'YSQUITHS DYING?"**

##### **MOURNERS**

WHY ARE ALL THE D'YSQUITHS DYING?

WHAT GRISLY SORT OF PLAGUE IS GOING ROUND? IT SEEMS WITH EVERY DAY,

A D'YSQUITH SLIPS AWAY,

AND HERE WE ARE, ASSEMBLED,

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<sup>33</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

PUTTING ANOTHER ONE IN THE GROUND.

IT'S FRANKLY ALL BEEN RATHER MYSTIFYING.

**MAN #2**

DO FORGIVE ME IF I SCOFF.

BUT IS IT NOT A TRIFLE ODD

HOW THEY'VE ALL GONE OFF TO GOD?

**MOURNERS**

SUDDENLY THEY'RE CONGREGATING

UNDERNEATH THE SOD!

OH, WHY ARE ALL THE D'YSQUITHS DYING?

**MAN #2**

WHAT A TASTELESS WAY OF SHOWING OFF.

**MOURNERS**

WHY ARE ALL THE D'YSQUITHS DYING?

IT SEEMS THAT ALL OF LONDON'S SHAKEN TO THE CORE.

**WOMAN #1**

TO LOSE ONE RELATIVE

ONE CAN CERTAINLY FORGIVE.

**MAN #1**

BUT HOW CAN YOU EXCUSE

LOSING TWO OR THREE OR FOUR?

OR SEVEN?

**MOURNERS**

WHY ARE ALL THE D'YSQUITHS DYING?

**WOMAN #1**

I'VE NEVER SEEN SUCH RECKLESSNESS BEFORE.

**MEN**

IT'S UNNERVING.

**WOMEN**

IT'S NOT THAT THEY'RE NOT UNDESERVING.

**MEN**

IT'S NOT THAT THEY'RE NOT UNDESERVING.

**MAN #3**

I NEVER LIKED THEM MUCH, I MUST CONFESS.

**WOMAN #3**

IN FAIRNESS,

YOU MUST ADMIT, AT LEAST,

IT'S A SHAME ABOUT THE PRIEST.

**MOURNERS**

I CAN'T IMAGINE MISSING SOMEONE LESS!

BUT REALLY,

WHY ARE ALL THE D'YSQUITHS DYING?

**MAN #2**

WHEN TRUTH TO TELL SO MANY OTHERS SHOULD.

**MOURNERS**

THOUGH PRIVATELY IT WAS SAID,

THEY SHOULD ALL DROP DEAD.

NO ONE THOUGHT THEY EVER REALLY WOULD.

**WOMAN #2**

I HAPPENED TO NOTICE THERE WASN'T A LOT OF CRYING.

**MAN #1**

I EVEN HEARD A SNIGGER FROM THE BACK.



**WOMAN #2**

OH, IT REALLY IS A SHAME

HOW THEY START TO FEEL THE SAME.

**MOURNERS**

HOW MANY ARE THERE LEFT TO BURY

AFTER WHAT'S-HIS-NAME?

**MAN #1**

I ask you

**MOURNERS**

WHY ARE ALL THE D'YSQUITHS DYING?

WHOEVER'S NEXT, I SWEAR I WON'T COME BACK.

I'M UTTERLY EXHAUSTED KEEPING TRACK.

AND MOST OF ALL, I'M SICK OF WEARING BLACK.

(Highhurst Castle. Lord Adalbert D'Ysquith paces, quite disturbed. )

**LORD ADALBERT**

WHY ARE ALL THE D'YSQUITHS DYING?

WHAT COULD EXPLAIN THIS TRAGIC FAM'LY CURSE? A NIGHT OR TWO AGO,

WE WERE AT FIDELIO.

HE STOOD AND BOOED THE MEZZO,

AND TODAY HE'S IN A HEARSE!

IF I SHOULD SAY THAT I WASN'T CONCERNED

I WOULD BE LYING.

ONE DOESN'T LIKE TO THINK OF ONE'S DEMISE. WITH SUCH EVENTS YOU SEE

HOW FRAGILE LIFE CAN BE. IT RATHER MAKES ME WONDER IF THE NEXT ONE WILL BE

ME!

**MOURNERS**

WHY ARE ALL THE D'YSQUITHS DYING?

**LORD ADALBERT**

THE FAMILY TREE'S BEEN WHITTLED DOWN TO SIZE.

**MOURNERS**

IT'S JUST A TWIG NOW!

**LORD ADALBERT**

THERE'S ALMOST NO ONE LEFT TO EULOGIZE.

**MOURNERS**

EXCEPT FOR YOU, DEAR!

**ALL**

LET US PRAY NO OTHER D'YSQUITH DIES! <sup>34</sup>

The shift from adapting the novel as opposed to the film led to changes both large and small, most of them small. The very first change was to the title. The new musical was to be called *The Truth About Monty*. Characters also had to be changed. The main protagonist in the film *Kind Hearts and Coronets* and in the musical is called Louis D'Ascoyne. In the new *Israel Rank/The Truth About Monty* version he emerged as Monty Navarro. As Louis, he was the son of an Italian Opera Singer and as Monty he became the son of a Castillian musician. For example, in *Israel Rank*, a character dies of a heart attack, and in *Kind Hearts and Coronets*, the foil character dies of a stroke, which had been maintained in Lutvak and Freedman's adaptation. Changing the mode of the character's death boiled down to changing only one line, a relatively simple fix.

The way Monty was informed of his inheritance differed as well. In *Kind Hearts and Coronets*, we actually meet the protagonist's mother before her death. Louis has been brought up knowing of his mother's disgrace and is tortured by the fact that she has worked herself to death to try and insure some sort of existence and future for them both. The utter disregard of her noble family for their impoverished situation and unwillingness to even allow his mother burial in the family crypt enrages Louis and he swears revenge. As she is dying, she sings the song 'Mother is On Your Shoulder'.

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<sup>34</sup> Manuscript courtesy of Steven Lutvak

This was written based on something my mother used to say to me: when I was a kid, she would tell me, on the days I had a test at school, that she would be on my shoulder, whispering the answers to help me, should I need her help. "But," she would add, "Don't turn your head too fast, because if you do, you'll knock me off." I told Robert that story, and we used it as the basis for 'Mother Is On Your Shoulder'.<sup>35</sup>

### **MOTHER IS ON YOUR SHOULDER**

MOTHER IS ON YOUR SHOULDER.

MOTHER IS ALWAYS NEAR.

MY DEAR, AS YOU GET OLDER,

YOU WILL FIND THAT THE WORLD IS COLDER THAN IT FEELS IN HERE.

BUT I PROMISE YOU, MOTHER IS ON YOUR SHOULDER.

NO MATTER WHAT MAY GO WRONG.

LONG AS YOU KNOW I AM THERE WITH YOU,

THERE'S NO HURT IN THE WORLD I WON'T BEAR WITH YOU,

AND TOGETHER, WE'LL BE STRONG.

STRONG, SO THAT THOSE WHO BETRAY,

AND WHO TAKES THINGS AWAY,

CANNOT TAKE AWAY WHO YOU ARE.

YOU BELONG TO A WORLD THAT YOU COULD HAVE HAD,

WITH THE LIFE THAT YOU SHOULD HAVE HAD.

REMEMBER WHO YOU ARE.

REMEMBER WHO YOU ARE,

AND REMEMBER THAT MOTHER IS ON YOUR SHOULDER.

ALWAYS WHISPERING WHAT YOU NEED TO HEAR.

OH, MY DEAR,

THERE WILL COME A TIME WHEN I'M GONE.

BUT I SAY AGAIN, THAT EVEN THEN,

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<sup>35</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

MOTHER WILL BE ON YOUR SHOULDER STILL,  
HELPING YOU GO ON.<sup>36</sup>

In the novel, and in *The Truth About Monty*, Monty is informed by one of the D'Ysquith servants, Miss. Shingle, of his inheritance and possible station. So 'Mother Is On Your Shoulder' was cut, and 'You're A D'Ysquith' was created.

**"YOU'RE A D'YSQUITH"**

**MISS SHINGLE**

YOUR MOTHER'S GREAT-GREAT-GRANDMOTHER LONG AGO MARRIED THE SECOND  
EARL'S BROTHER. THEY HAD A RAKE FOR A SON, ALTHOUGH HE MARRIED AN HEIRESS  
FROM KENT.

NOW, THEY HAD A CHILD, AND DON'T YOU KNOW, HE WAS TO FATHER YOUR MOTHER.  
LITTLE BERENICE,  
MAY SHE REST IN PEACE,  
IN ANY EVENT... YOU'RE A D'YSQUITH!

**MONTY**

No...

**MISS SHINGLE**

OH, THE D'YSQUITH BLOOD IS FLOWING THROUGH YOU!

**MONTY**

Me? A D'Ysquith...?!

**MISS SHINGLE**

A GENUINE, BONAFIDE D'YSQUITH!

**MONTY**

Rubbish...

**MISS SHINGLE**

OF COURSE, OF COURSE,  
YOU DON'T BELIEVE ME, DO YOU?

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<sup>36</sup> Manuscript courtesy of Steven Lutvak

YOUR MOTHER  
MET YOUR FATHER ON HOLIDAY,  
HE WAS HER ONE-IN-A-MILLION.  
NEVER BEFORE HAD SHE FELT THIS WAY, SHE KNEW IT WAS LOVE, AND YET...  
THE FAM'LY REACTED WITH GREAT DISMAY, HIS CRIME WAS THAT HE WAS CASTILIAN.  
"LET HIM GO,  
OR ELSE YOU'LL KNOW  
A LIFE YOU WILL LIVE TO REGRET!" THIS WAS NO IDLE THREAT!  
"YOU'RE A D'YSQUITH!  
BERENICE, YOU'RE A D'YSQUITH!  
AND THE D'YSQUITH NAME MUST BE PROTECTED! DON'T EVER FORGET YOU'RE A  
D'YSQUITH! AND A PERFECTLY BREEDABLE D'YSQUITH SHALL OBEY AND DO WHAT IS  
EXPECTED!"  
THERE WAS NOTHING YOUR MOTHER COULD SAY.  
SHE ELOPED WITH YOUR FATHER THE VERY NEXT DAY.  
YOUR MOTHER  
MADE ME PROMISE I'D NEVER TELL,  
BUT NOW SHE IS NO LONGER LIVING.  
SHE WANTED TO SPARE YOU HER PRIVATE HELL, BUT I THINK YOU DESERVE TO  
KNOW.  
TAKE THIS KNOWLEDGE AND USE IT WELL,  
THE FAM'LY MAY YET BE FORGIVING.  
(holding the birth certificate) THIS WILL GUARANTEE  
YOU'VE A RIGHT TO BE  
ON THE FAM'LY TREE  
AND IT SEEMS TO ME INDISPUTABLY, HEAD TO TOE...

YOU'RE A D'YSQUITH!

A D-APOSTROPHE-Y-SQUITH!

THERE CAN BE NO OTHER WAY TO VIEW IT! MONTAGUE, YOU'RE A D'YSQUITH!

**MONTY**

I'M ALL OF A SUDDEN A D'YSQUITH!

**MISS SHINGLE**

(spoken)Yes!

AND IT'S TIME THAT EVERYBODY KNEW IT!

MISS SHINGLE (cont'd) YOU ARE THE SON OF THE DAUGHTER

OF THE GRANDSON OF THE NEPHEW OF THE 2ND EARL OF HIGHHURST!

**MONTY**

IT WOULD SEEM I'M A D'YSQUITH!

**MISS SHINGLE**

YOU'RE A D'YSQUITH!

MONTAGUE, I PICTURE YOU AT HIGHHURST!

**MONTY**

I'M A D'YSQUITH!

**MISS SHINGLE**

YOU'RE A D'YSQUITH!

**MONTY**

I'M AN INDISPUTABLE D'YSQUITH!

**MISS SHINGLE**

YOU'RE A D'YSQUITH!

**MONTY**

AND HIGHHURST COULD BE MY HURST!

I'M A D'YSQUITH!

**MISS SHINGLE**

YOU'RE A D'YSQUITH!

## **MONTY & MISS SHINGLE**

A D'YSQUITH! A D'YSQUITH! A D'Y! (SQUITH!)

In all four cases, book, film and both musical versions, it is the death of his mother, combined with Sibella's rejection and the family banking firm's rejection that drive Louis /Monty to make the choices he does to attain the Earldom. Although, in *The Truth About Monty*, Monty doesn't really make the decision to pursue this plan of attack until after he kills his first family member, the Reverend D'Ysquith. This murder isn't premeditated and happens because Monty doesn't prevent the Reverend from falling to his death from the church tower.

## **REVEREND LORD EZEKIAL**

Oh...ah...I'm...I'm afraid I shall need your hand, please...

## **MONTY**

Yes, of course, my Lord!

(Monty takes his hand. Then a light goes on in Monty's head and, suddenly, time stands still. Lord Ezekial freezes in a precarious position. Monty's hand appears to be the only obstacle between the Parson and certain death.)

"FOOLISH TO THINK" (REPRISE)

## **MONTY (cont'd)**

(singing)

FOOLISH TO THINK

I COULD LET HIM FALL.

HE'S ON THE BRINK,

IT SEEMS.

BUT WHY SHOULD I PAUSE

WHEN I KNOW THE CAUSE

OF MOTHER'S...SHATTERED DREAMS?

## **REVEREND LORD EZEKIAL**

Help me, you presumptuous climber!

## **MONTY**

WHAT CAN I DO FOR THE D'YSQUITHS

TO REPAY THEIR WARM EMBRACE?

WHAT CAN I TAKE FROM THE D'YSQUITHS...

EXCEPT, PERHAPS, THEIR PLACE?

BUT WITH EIGHT OTHER D'YSQUITHS AHEAD OF ME, THEIR FOOLISH PRIDE SURVIVES.

**REVEREND LORD EZEKIAL**

I beg you!

**MONTY**

WHAT CAN I TAKE FROM THE D'YSQUITHS?

EXCEPT, PERHAPS, EXCEPT, PERHAPS--

**REVEREND LORD EZEKIAL**

Please!

**MONTY**

EXCEPT, PERHAPS THEIR LIVES...

(Lord Ezekial un-freezes. It takes very little for Monty to "help" Lord Ezekial fall over the side of the bell tower. Monty watches until he hits the ground below. )

**MONTY**

WHO WILL LOOK FOOLISH THEN? <sup>37</sup>

One of the murders occurring in *Kind Hearts and Coronets* features Ascoyne D'Ascoyne and his mistress in a boat, ostensibly fornicating. Taking advantage of their obvious distraction, Louis enters and releases the boat, allowing it to drift down stream and over a waterfall. For the first rewrite of the scene, the lovers park their motorcar in a 'lover's lane' setting, and Louis, now Monty, releases the brake and pushes the car over a cliff. After much discussion and deliberation between the writers and their lawyers, the team decided the scene too closely resembled the scene in *Kind Hearts and Coronets* as the lovers were still fornicating, and still faced their doom in a vehicle, regardless of whether it operated on land or water. The writer's next idea, which the

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<sup>37</sup> Manuscript courtesy of Steven Lutvak



current production maintains, presents the lovers out ice-skating and although they are not in the act of copulation, they are suitably distracted enough for Monty to saw a hole in the ice which the lovers inevitably fall through.

**“POISON IN MY POCKET”**

**ASQUITH JR.**

YOU AND I GO SAILING BY,  
AND NO ONE WILL KNOW WHERE TO FIND US. UNSEEN, UNKNOWN, AND BLISSFULLY  
ALONE, WE’RE LEAVING THE RIFF-RAFF BEHIND US. ALL AFTERNOON IN OUR SWEET  
COCOON, OUR CARES, FOR THE MOMENT, AT BAY; SIDE BY SIDE,  
WHO KNOWS HOW FAR WE’LL GLIDE? BID THE WORLD GOOD-BYE, EAGERLY WE FLY  
AWAY.

(As they glide onto the ice, Monty is left behind, frustrated.)

**MONTY**

I AM STANDING HERE WITH POISON IN MY POCKET,  
STANDING ON THIS FROZEN LITTLE DOCK, IT  
SEEMS THAT I’VE JUST LET THEM SKATE MY OPPORTUNITY AWAY. IF I’D HAD THE  
POISE TO PUT THE POISON IN  
A POT OF TEA OR ELSE A SHOT OF GIN,  
I WOULD BE BACK AMID THE NOISE OF LONDON  
BY THE END OF DAY.  
BUT,  
I AM STANDING HERE WITH POISON IN MY POCKET,  
ONE EYE ON THE TARGET, ONE EYE ON THE CLOCK, IT  
BETTER HAPPEN SOON BEFORE I LOSE MY NERVE AND RUN.  
IF I HAD A KNIFE I COULD HAVE GRABBED HIM,  
THEN DISCREETLY KNOCKED HIM ON THE HEAD AND STABBED HIM, NOT TO MENTION  
WHAT I WOULD HAVE DONE  
IF I HAD HAD A GUN.

THEN AGAIN,  
THE THOUGHT OCCURS, IF I HAD TRULY TAKEN STOCK, IT MIGHT HAVE STOPPED ME  
PUTTING POISON IN MY POCKET, WHAT A FOOL TO TRAVEL ALL THIS WAY AND NOT  
THINK TWICE. MURDER'S NOT A HOBBY FOR THE CAUTIOUS,  
THOUGHTS OF VIOLENCE CAN MAKE THE TIMID NAUSEOUS--

(Monty gets an idea. )

**MONTY (cont'd)**

UNLESS, OF COURSE,  
THE VICTIM PLUNGES HEADLONG THROUGH THE ICE!  
(Monty quickly puts on skates, as D'Ysquith Jr. and Miss Barley execute a charming pas de deux  
on the ice.)

**MONTY (cont'd)**

IT APPEARS THAT I'VE BEEN  
HANDLED QUITE AN OPPORTUNE SOLUTION.  
ALL THAT STILL REMAINS IS PROPER EXECUTION.  
I HAD BETTER JOIN THEM ON THE LAKE  
BEFORE IT GETS TOO LATE!  
SUDDENLY THERE IS NO STUMBLING BLOCK, IT  
MEANS THAT I WON'T NEED THE POISON IN MY POCKET...

(Monty glides onto the ice.)

**MONTY (cont'd)**

WHAT A STROKE OF LUCK  
SIBELLA TEASED ME 'TIL I LEARNED TO SKATE!  
(Monty does a fancy move before he hurries to catch up and keep the Asquith Jr. and Miss Barley  
in sight, as they cling to each other in a most romantic fashion.)

**MONTY & ASQUITH JR.**

CLOSER NOW...

**ASQUITH JR.**

TIME IS RACING...

**MONTY**

TIME IS RACING NOW...

**MONTY & ASQUITH JR.**

TIME IS RACING ON.

**MISS BARLEY**

AH-AH-AH-AH-AH-AHHHHHH.

**MONTY & ASQUITH JR.**

IT'S ALL A MATTER OF PACING.

**MISS BARLEY**

AH-AH-AH-AH-AH!

**MONTY & ASQUITH JR.**

IN A MOMENT, THIS MOMENT WILL BE GONE.

(Monty passes the romantic couple, who are oblivious to his presence. He starts to saw a large whole in the ice. )

**ASQUITH JR.**

YOU AND I GO SAILING BY,

AND NO ONE WILL KNOW WHERE TO FIND US. UNSEEN, UNKNOWN, AND BLISSFULLY ALONE, WE'RE LEAVING THE RIFF-RAFF BEHIND US. ALL AFTERNOON IN OUR SWEET COCOON, OUR CARES, FOR THE MOMENT, AT BAY; SIDE BY SIDE, WHO KNOWS HOW FAR WE'LL GLIDE? BID THE WORLD GOOD-BYE, EAGERLY WE FLY AWAY

**MONTY (simultaneously)**

WITH THE RHYTHM OF A VIOLINIST

I'LL BE SAWING WHERE I THINK THE ICE IS THINNEST TO CREATE A HOLE THROUGH

WHICH

THE TRAGIC LOVERS MEET THEIR DOOM.

**MISS BARLEY**

AH-AH-AH-AH-AH-AH-AH-AH-AH-AH!

**MONTY**

ONE COULD CALL THIS RATHER DIABOLIC.

IS IT STRANGE TO FEEL A WEE BIT MELANCHOLIC? LIKE A TWINGE OF SOME  
REMORSE, OF COURSE, OR CONSCIENCE, I ASSUME.

**MISS BARLEY**

AH-AH-AH-AH-AH-AH-AH-AH!

AHH-AHH-AHH-AHH-AHH!

**MONTY**

BUT NO,

AS I'M CUTTING, I AM CONTEMPLATING,

AND THE TRUTH IS IT'S A TAD EXHILARATING.

EVEN THOUGH IT IS NOT INCONCEIVABLE THAT I'LL BE CAUGHT.

**MISS BARLEY**

AH-AH-AH-AH-AH-AH-AH-AH-AH!

AHH-AHH-AHH-AHH-AHH-AHH-AHH!

**MONTY**

STILL IT COMES AS QUITE A SHOCK, IT

SEEMS A NOVICE STANDING HERE WITH POISON IN HIS POCKET CAN DISCOVER  
MURDERING IS EASIER THAN HE HAD THOUGHT.

**MISS BARLEY**

AH-AH-AH-AH-AH-AH-AH-AH!

AHH-AHH-AHH!

**ASQUITH JR.**

BID THE WORLD GOOD-BYE,  
EAGERLY WE FLY-- AWAY

**MONTY**

ALL OF THIS IS, FRANKLY, EASIER THAN I HAD THOUGHT! <sup>38</sup>

In the film version of *Kind Hearts and Coronets*, Henry D'Ysquith, a country gentleman, has a wife named Edith who soon becomes a widow after Louis causes an 'accident' in the darkroom where Henry goes to work on his photography. In the new version Henry is an avid beekeeper and with Monty's help, dies from a surfeit of bee stings. He leaves behind, as in the novel, a sister named Phoebe who eventually becomes the secondary love interest. Other family murders in the *Kind Hearts and Coronets* included that of a suffragist being shot down in an air balloon, an Admiral who goes down with his ship at sea, the shooting of the current Earl on a hunt and a general who dies from a bomb in a tin of caviar. In *The Truth About Monty*, these murders include death by bees, the reverend's fall, falling through the ice as well as Lord Bartholomew being killed by a barbell during his fitness regime, Lady Salome is shot to death during her performance of Hedda Gabbler when her gun is filled with real bullets. Lady Hyacinth is off on a philanthropic expedition and is murdered by cannibals and the current Earl who is actually poisoned by someone else.

Two other characters who didn't make it into the revised version were those of Lady Maude and Lionel, Sibella's husband. In the film *Kind Hearts And Coronets*, Louis is having dinner at the house with the current Earl, and the Earls new fiancé Lady Maude. This was a very entertaining scene as Maude Guernsey, in keeping with her namesake, doesn't contribute much to the conversation, and when she does it is through a mouthful of food. During the readings/presentations, that food varied between cookies and cakes. By the time the show went to Sundance it had evolved into a heaping bowl of rice pudding.

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<sup>38</sup> Manuscript courtesy of Steven Lutvak

**"SHE'S A GUERNSEY"**

**LORD ETHELRED**

I HAVE MET WITH LADY GUERNSEY,  
AND THE WEDDING IS PROCEEDING.  
THERE ISN'T MUCH THERE, BUT I NEED AN HEIR,  
AND THE GIRL WAS MEANT FOR BREEDING.

**EDITH**

THESE BISCUITS ARE LOVELY, AREN'T THEY?

**ETHELRED**

THEY ARE FAR TOO SWEET AND BAD FOR THE DIGESTION.

**MAUD**

NOTHING BOTHERS MY DIGESTION.

**ETHELRED**

I DON'T NEED A GIRL WHO'S GRACEFUL.

**MAUD**

YOU THERE, BRING THOSE BISCUITS BACK!

**ETHELRED**

NEVER WITHOUT HER FACE FULL, NOT MUCH CHARM OR POISE.

**MAUD**

THESE SERVANTS ARE JUST DISGRACEFUL!

**ETHELRED**

SUCH A LOT OF NOISE!

BUT SHE'S A GUERNSEY, AND GUERNSEY'S GIVE YOU BOYS.

**EDITH**

HAVE YOU BEEN TO THE OPERA THIS SEASON?

**MAUD**

OH NO!

**ETHELRED**

I DON'T NEED A GIRL WHO'S CLEVER.

**MAUD**

OPERA MAKES MY HEAD EXPLODE!

**ETHELRED**

NOT THOUGHTFUL OR BRIGHT, HOWEVER,  
THOSE ARE JUST DETAILS.

**MAUD**

ME, READ A BOOK?!

NO, NEVER!

**ETHELRED**

EV'RY FOIBLE PALES, FOR SHE'S A GUERNSEY,  
AND GUERNSEY'S GIVE YOU MALES.  
IT'S REALLY QUITE AMAZING HOW RELIABLE THEY'VE BEEN.  
THE GUERNSEY'S MUST BE GRAZING ON SOME GRASS THAT'S AWFULLY GREEN.  
THEY'VE BEEN RAISING MOSTLY MEN SINCE GUINEVER WAS QUEEN,  
WITH THE ODD GIRL IN BETWEEN,  
LIKE MAUD!  
I DON'T NEED A GIRL WHO'S GRACIOUS.

**MAUD**

HE'S OLD, BUT HE'S A DUKE, OF COURSE.

**ETHELRED**

LONG AS HER HIPS ARE SPACIOUS,

**MAUD/ETHELRED**

IF HE'S/SHE'S A FOOL WHO CARES?

**MAUD**

LONG AS HE'S NOT FLIRTATIOUS!

**ETHELRED**

I'LL HIDE THE WENCH UPSTAIRS,  
SHE'S A GUERNSEY,  
AND GUERNSEY'S GIVE YOU SONS! BOY'S! MALES!  
REALLY WHAT COMPARES WITH A GUERNSEY?!  
AND GUERNSEY'S GIVE YOU HEIRS!

**MAUD**

I'M STRONG AS AN OX!

**ETHELRED**

SHE'S A GUERNSEY,  
AND GUERNSEY'S GIVE YOU HEIRS!

**MAUD/ETHELRED**

GIVE US A KISS!<sup>39</sup>

In the rewrite, the Earl is possessed of a harridan for a wife and their squabbles make for very uncomfortable dinner conversation. Lionel was Sibella's choice for a marriage that would provide her the status and comfort she wanted. In both versions, Lionel commits suicide and Louis is blamed for the murder (the one he didn't actually commit). In *The Truth About Monty*, we never actually meet Lionel, and Monty is accused of the poisoning of the current Earl (also a murder he didn't commit). The last great change is in the way the protagonist is released from prison and what is done with his memoirs. In the original versions, Sibella is the one who has accused Louis and comes to him saying that she will reveal Lionel's death to be a suicide if Louis will murder his fiancé Edith and marry her. Louis agrees to this and goes to leave and realizes his memoirs confessing everything have been left in the prison cell. In the new version, as Monty is in his cell awaiting the verdict from his trial, Phoebe and Sibella concoct a plan to free Monty. They go to the authorities accusing each other of the murders, which allows for reasonable doubt in the minds of the authorities.

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<sup>39</sup> Manuscript courtesy of Steven Lutvak



**“THAT HORRIBLE WOMAN”**

**SIBELLA**

THAT HORRIBLE WOMAN!

THAT CONTEMPTIBLE GIRL!

**DETECTIVE**

Countess Navarro?

**SIBELLA**

OH, MAKE NO MISTAKE,

SHE'S A VENOMOUS SNAKE,

AND SHE POISONED THE EARL! AND MISTER NAVARRO

WAS A PAWN IN HER PLAN!

I HAVE COME HERE TO SAVE HIM, HE'S AN INNOCENT MAN!

**DETECTIVE**

Do you know what you're saying, Mrs. Holland?

(Lights up on Phoebe, in another room, with a MAGISTRATE.)

**SIBELLA & PHOEBE**

HE'S AN INNOCENT MAN!

**PHOEBE**

THAT HORRIBLE WOMAN!

**MAGISTRATE**

Mrs. Holland?

**PHOEBE**

DO NOT UTTER HER NAME!

YOU MUST TELL THE COURT

HOW SHE POISONED THE PORT AND DIVERTED THE BLAME!

GO AND BRING HER TO JUSTICE, JUST AS FAST AS YOU CAN!

AS I'VE TOLD YOU, MY HUSBAND IS AN INNOCENT MAN!

**SIBELLA**

SHE SEEMED TENSE AND ALERT

**PHOEBE**

FROM HORS D'OEUVRES TO DESSERT

**SIBELLA & PHOEBE**

YET SHE FLIRT-

ED AND BATTED HER EYES AT THE MEN.

**SIBELLA**

THEN SHE ROSE FROM HER SEAT

**PHOEBE**

THEN SHE REACHED FOR A SWEET

**SIBELLA & PHOEBE**

EVERY GESTURE WAS PLANNED.

**PHOEBE**

THEN

**SIBELLA**

THINKING NO ONE COULD SEE--

**SIBELLA & PHOEBE**

NO ONE SAW HER BUT ME--

**PHOEBE**

IN A BLINK

**SIBELLA & PHOEBE**

SHE PUT DROPS IN HIS DRINK.

**PHOEBE**

THAT'S A QUOTE

**SIBELLA**

FROM A LETTER SHE WROTE

**PHOEBE**

IN HER VERY OWN HAND!

**SIBELLA**

IN HER VERY OWN HAND!

(As evidence, she thrusts a letter into the Magistrate's hand.

As evidence, she thrusts a letter into the Detective's hand. )

**SIBELLA & PHOEBE**

THAT HORRIBLE WOMAN!

**SIBELLA**

THAT MISERABLE MINX!

**PHOEBE**

THAT LIBIDINOUS JINX!

**SIBELLA**

EVERY WORD IS A LIE!

**PHOEBE**

SHE'S UNSPEAKABLY SLY!

**SIBELLA & PHOEBE**

AND I HEAR THAT SHE DRINKS!

**PHOEBE**

SURELY MISTER NAVARRO

**SIBELLA**

AND SO MONTY, OF COURSE

**SIBELLA & PHOEBE**

WAS A PAWN IN HER PLAN!

**PHOEBE**

HE WOULD NOT HURT A FLY!

**SIBELLA**

HE COULD NOT HARM A FLEA!

**PHOEBE**

YOU CANNOT LET HIM DIE!

**SIBELLA**

YOU MUST SET THE MAN FREE!

**SIBELLA & PHOEBE**

FOR MONTAGUE D'YSQUITH NAVARRO

IS AN INNOCENT MAN!

**SIBELLA**

(to Magistrate now)

IT WAS DONE OUT OF GREED!

**PHOEBE**

(to Detective now)

IT WAS DONE OUT OF SPITE!

**SIBELLA**

SHE WANTED THE TITLE!

**SIBELLA & PHOEBE**

SHE WANTED REVENGE!

**PHOEBE**

AND MY HUSBAND, SHE KNEW

**SIBELLA**

AND SHE DIDN'T CARE WHO

**SIBELLA & PHOEBE**

WOULD BE HANGED FOR THE CRIME!

**DETECTIVE & MAGISTRATE**

(The GUARD passes by and overhears.)

DEAR LADY!

**PHOEBE**

SHE

**SIBELLA**

AS I'M SURE YOU CAN SEE

**SIBELLA & PHOEBE**

SHE'S/IS A MERCILESS

**SIBELLA**

RAVENOUS

**PHOEBE**

MAN-EATING

**DETECTIVE & MAGISTRATE**

MONSTROUS

**ALL**

ASSASSIN!

**DETECTIVE & MAGISTRATE**

A BEAST!

**SIBELLA & PHOEBE**

MONTY MUST BE RELEASED!

**DETECTIVE & MAGISTRATE**

AND THERE ISN'T MUCH TIME!

**SIBELLA & PHOEBE**

AND THERE ISN'T MUCH TIME!

**DETECTIVE, MAGISTRATE (& GUARD)**

THAT HORRIBLE WOMAN!

**ALL (INCLUDING GUARD)**

THAT SINISTER WENCH!

**SIBELLA**

PRAY YOU, DO WHAT IS JUST!

**PHOEBE**

STOP THE JURY, YOU MUST

**ALL (INCLUDING GUARD)**

GET A STAY FROM THE BENCH!

IN THE NAME OF KING EDWARD WE MUST DO ALL WE CAN!

**SIBELLA & PHOEBE**

AS THE ENDING WAS CHANGED

WHEN THE NIGHTINGALE SANG

**DETECTIVE & MAGISTRATE**

FATE MUST BE REARRANGED

**ALL (INCLUDING GUARD)**

WE MUST NOT LET HIM HANG!

FOR MONTAGUE D'YSQUITH NAVARRO IS AN INNOCENT MAN!

HE'S AN INNOCENT MAN!

HE'S AN INNOCENT—<sup>40</sup>

The murderer actually ends up being Miss Shingle, and Monty leaves with both his wife and mistress and a guard races out to return his memoirs that were almost left behind.

Lutvak and Freedman arranged yet another presentation of the work to demonstrate the necessary changes. Produced this time by Sundance Theater in association with Playwrights Horizon and The Old Globe, the hunt for producers resumed. This evolution of the production marked the entrance into the company of Jefferson Mays, taking on the roles of the entire D'Ysquith Family. Jefferson is best known for his performance in the 2003 Broadway production of Doug Wright's Pulitzer Prize-winning one-man play, *I Am My Own Wife*, which garnered him an Obie Award, a Theatre World Award, the Drama Desk Award for Outstanding One-Person Show

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<sup>40</sup> Manuscript courtesy of Steven Lutvak

and the Tony Award for Best Performance by a Leading Actor in a Play. The cast of Steven and Richard's adaptation, directed by Darko Tresnjak included Jefferson Mays, Nancy Anderson, Santino Fontana, Laura Osnes, Bill Gross, Jennifer Smith, Allison Spratt, Paxton Whitehead, and the present author. The presentation once again was received positively and resulted in the agreement of La Jolla Playhouse to stage a production that would star Jefferson Mays and would be directed by Darko Tresnjak; furthermore, a producer signed on to bring the adaptation to Broadway. On February 23rd, 2010, just before the contracts were due to arrive, Slotnik wrote to tell Lutvak and Freedman they were being sued.

## II. THE LAWSUIT

When filing the suit alleging copyright infringement and breach of contract in August, 2008, Canal+ stated that the writers had just taken the same version of the musical and changed a few names and the title. Canal+ further alleged that in making these changes the writers had still retained the humor and style of the original and most especially the conceit of having all eight members of the aristocratic family played by one actor. Leading up to the lawsuit Slotnik had been corresponding in emails with Canal+, informing them that Lutvak and Freedman were moving ahead with the project, and explaining that the writers would derive their adaptation from *Israel Rank* instead of *Kind Hearts and Coronets*. Since Canal+ maintained no copyright or licensing for the novel, they would henceforth be excluded from the dealings of the project. Canal+ considered Steven and Robert's decision to shift the origin of their work to be a breach of contract, and filed a lawsuit on February 19, 2010, coming after the writers in full force. There followed many meetings and phone-calls with the established venue La Jolla's lawyer, Lutvak's transactional attorney, Barry Slotnik, Steven and Robert's litigator and his associate, Freedman's attorney and his associate, and the producer's attorneys, all came to the same conclusion: "What do we do now?" The venue needed to know very quickly what was happening with these legal disruptions and how quickly they could be settled. Canal+ was not interested in settling, and things began to spiral downward in regards to the pending suit. After deliberation, Steven and Robert's producer began to hedge and withdrew her offer, claiming the production couldn't afford the legal bills caused by litigation with Canal+.

We were terrified, needless to say. I mean, terrified. And on a personal level, I thought for sure I was going to have to go on anti-anxiety medication. I was having nightmares of sleeping with a corpse. It was a very, very, very terrible time. I was 50, and I had been writing shows for years with a modicum of success. But I'd never written a show that worked. And I know that this is the first time I had written a show that—I mean, it's hard enough to write a musical that works – a show that really works. Robert and I talked about are we going to fight this? And it never seemed an option to us not to fight it.<sup>41</sup>

Lutvak and Freedman were sued in February, and the judge scheduled a pre-motion conference for May. The pre-motion conference is a chance for the judge to review the facts and facets of the case, and for the parties to file their motions, which the judge then considers in delineating the next step in the legal proceedings. Typically when a party is sued, the least rigorous and most expedient course of action is to file a motion to dismiss, which marks the earliest point in time a defendant can attempt to end all legal proceedings in regards to the suit. During the pre-motion hearing the judge heard Canal+ and their version of events, and Slotnik subsequently filed a motion for dismissal. The judge decided to advise Slotnik to file for summary judgement, which Slotnik explained to Lutvak and Freedman would cost them another five figures and at least another six months. Slotnik, on the advice of his associate, sent a letter to the judge requesting reconsideration of his motion to dismiss, citing the lack of merit in Canal+'s case and his client's lack of available legal funds. Canal+ voiced their objections once more, and once more Slotnik responded. The judge quickly granted permission for Slotnik to file his motion for dismissal. After many motions were filed and rebutted, it became clear that Canal+ based the brunt of their case on the axiom that one actor playing all of the murder victim roles was intrinsic to the artistic expression of the movie. While Canal+'s assertion might be artistically valid, it bore no legal merit. Subsequently, Canal+ brought forth an expert witness, Dr. Michael Newton, a University of Leiden docent who composed a scholarly text about *Kind Hearts and Coronets*, to defend their position. The judge's official decision reveals the expert's testimony was irrelevant in evaluating the case as it only contributed to the matter of the writer's original material copying the plaintiff's original concept, a fact not in dispute in the case.

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<sup>41</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014



## JUDGE HOLWELL'S DECISION (abbreviated)

"...This unique quality of the film medium—part narrative, part visual—gives Canal+'s emphasis on the so-called composite victim some surface appeal. Yet the same ineffable quality also makes the singularity of Canal+'s emphasis somewhat misplaced. A film is a film because all the elements work together, but Canal+ asks the Court to examine just the device that is similar. Canal+ appears to justify that myopia by arguing that the "composite portrait is the most important single 'element' in defendants' musical as in the Film" and "what most people remember about the Film." (Pl's Opp'n at 10, 22). Perhaps so, but the question here is not whether most people would remember what all critics agree is a *tour de force* by Sir Alec Guinness, but whether a discerning observer having viewed both works, "unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same." *Yurman Design, Inc.*, 262 F.3d at 111 (quotation marks omitted). Where Canal+ contends that the composite victim is "bound together in an inseparable unity with all of the [F]ilm's other elements," the total concept and feel inquiry cannot be conducted with "good eyes and common sense" without considering all the elements that make the film the Film. *Gaito*, 602 F.2d at 66.

"The most important element, of course, is the story itself. Indeed, absent the unprotectible story of a disinherited aristocrat murdering all of the heirs between himself and a dukedom, the creators of the Film who decided to have Guinness play multiple roles would have had nothing to transform. Yet an observer who overlooked the story to focus on the multiple role convention would scantily be believed to have seen the work at all rather than merely the current DVD cover showing Sir Alec Guinness playing all eight victims. Hence the story is not merely a canvas on which the device of using one character to play multiple roles paints with comic strokes. Rather, the story itself is a large part of the work's total concept and feel.

"It is also notable that an observer following the story of each work could not fail to notice that the works—to the extent that they differ from the Novel—have different endings that reflect the works' different comedic registers. In the Musical, the protagonist is accused of murdering the head of the family, a murder which, unbeknownst to the audience, has actually been committed by Miss Shingle. In the Film, the protagonist is charged with murdering Lionel whom, after the somber and pitiful scene in which he has pled for the protagonist's help and then attacked him, it seems clear has committed suicide. In the Musical, Sibella and Phoebe jointly hatch a plan to free the protagonist and their exit—each with one arm on the protagonist's, shaking hands behind his back with a knowing nod—suggests they are content to share his affections, a somewhat salacious twist on the happily ever after ending. In the Film, however, the plan that saves the protagonist is an extortion of one life for another. In the Musical, in an entirely absurd *deus ex machina*, Miss Shingle confesses to the murder. And the protagonist's distant cousin adds levity to the prospect of another series of murders. The Film, however, fades to black with two foreboding cliffhangers: will the protagonist be convicted on the basis of his memoirs that he has left in his cell, and will he murder Edith to repay Sibella for saving the very life she endangered with false accusations? In short, the end of the Musical is absurd and light-heartedly scandalous; the end of the Film is cruel, dramatic, and hardly comedic at all.

"The same is true of the works writ large. Indeed, there is merit to Defendants' characterization of the Film as "a subtle, dark Wildean comedy, with some truly sinister scenes (such as the point-blank execution of the [head of the family]" to which they contrast the Musical as "a far lighter, broad comedy, filled with several bawdy scenes and riotous musical numbers." (Defs.' Br. at 22.) Many elements of the Film—the cliff-hanger ending, scenes of violence, Lionel's drunken plea, Sibella's extortion—are dramatic rather than comedic. To the extent that the Film is a comedy, it achieves that effect largely through dry wit, deadpan timing, deliberate understatement, and overplayed British class tropes: the dandified upward male climber of a protagonist; the curmudgeonly and reactionary *paterfamilias*; the young aristocrat more interested in the arts than in his wife; the stodgy, nostalgic general; the liquored up clergyman; the philandering profligate;

the admiral who puts duty over sanity; and the rabbleroising suffragette. In short, the Film is at most tongue-in-cheek.

"The Musical, however, sticks its tongue out. It is a bawdy, slapstick comedy. Where the Film is subtle, the Musical is campy. The songs use barely disguised sexual innuendo, parody modern tropes such as physical fitness fanatics, and ascribe to the aristocracy views of the poor and of Africans that are so exaggerated that they would be offensive if they were not so obviously mocking. And however improbable they may be, the murders in the Film involve largely realistic means—bombs, poison, firearms—but the murders in the Musical are unbelievable to the point of farce: attracting a swarm of bees, sending a Ferris wheel out of control, cannibalism, and sabotage in the weight room are meant to be funny because they are so absurd.

As can be seen from the foregoing, the total concept and feel of the Film is a dark comedy/drama about a disinherited heir who murders his relatives to obtain the baronetcy, while that of the Musical is a bawdy, over-the-top send-up of the same (unprotectible) plot. That both works employ the convention of using a single actor to play all the victims may add to the amusement, but it is hardly the "heart and soul" of each work. At their core, each rendition presents a radically different aesthetic placing one outside the copyright protection of the other...

"In sum, copyright infringement requires substantial similarity between protectible aspects of the allegedly infringing and infringed works. Both works use one actor to play multiple roles, but under the discerning observer test, that device is not protectible. And however protectible a combination of elements might be under the total concept and feel test, the works do not have a similar feel. Canal+ would have the Court apply a kind of intermediate test that examines not the elements alone or the works in their entirety but only one aspect of those works: how the decision to portray characters in a story interacts with that story. At bottom, however, that inquiry merely asks how parts have been acted. As applied here, that amounts to an argument that Sir Alec Guinness's *tour de force* is protectible. But it is no more protectible than Charles Laughton's Henry VIII or Sir Laurence Olivier's Hamlet. See *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 909 (S.D. Cal. 1950). The performance may never be equaled, but that does not mean nobody has the right to try.

"... Canal+ alleges that Defendants have breached a promise to "cease dealing in and with any materials written or created by [them] which represent, incorporate or embody the Film or any elements in the Film, including without limitation, the text, characters, and situations in the Film, all of which elements shall be deemed to have reverted to [Canal+]." (Compl. ¶ 23; Slotnick Dec. Ex. E at 2.) In effect, Canal+ alleges that it licensed the rights to a musical adaption of the copyrighted Film for a term not to exceed one year from the date that Canal+ declined to produce the Musical, at which point the exclusive right to any adaption of the Film reverted to Canal+. However, that exclusive right flowed from the Copyright Act, not from the Agreement. Thus the claim that Defendants usurped the exclusive right of Canal+ to adapt the Film is nothing more than a claim that Defendants have violated a right of Canal+ under the Copyright Act. Labeling that claim as one for breach of contract cannot change the fact that the claim is not "qualitatively different from a copyright infringement claim." *Briarpatch Ltd.*, 373 F.3d at 305. Rather, the claim merely alleges that Defendants have committed "an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law." *Id.* Accordingly, the Copyright Act preempts the claim that Defendants' adaption is a breach of contract and that claim is dismissed. <sup>42</sup>

Eventually they did win on their motion to dismiss. Which meant in essence that the judge determined that no reasonable jury would find on the behalf of the plaintiff: that the claim that has

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<sup>42</sup> Canal+ Image UK Ltd. v Steven Lutvak and Robert Freedman, 1:10-cv-01536-RJH. (S.D.N.Y. May 29, 2011). 26-42.

been brought is one that is not even worth going through discovery, or worth going through a jury because the result can't be anything other than a victory for the person who filed the motion to dismiss.

I don't mind telling you that I was in a shrink's office and I had forgotten to turn the phone off. And I said to my shrink, "I'm sorry," and I took out the phone to turn it off and I said, "It's Barry." She said, "Answer him!" And Barry said, "If I were to tell you, hypothetically, you won your case, what would you do? And I said, "I would hypothetically start crying." And he said, "You can start crying." I said, "I'm about to tell you I love you. And Barry said, It's interesting, there are cases and there are cases. I care about all of them but I can tell you without any exaggeration that I'm almost as excited as you are that we won this."<sup>43</sup>

Having been granted the motion to dismiss, Lutvak and Freedman filed a motion for compensation for their legal costs. Concurrently, Canal+ presented an opportunity for settlement, requesting a percentage of the production, acting on their own presumption that they were underlying rights holders. Further talks with Canal+ revealed a no disparagement clause and a non-disclosure clause on the table. Lutvak and Freedman were also negotiating how much of that money would cover their legal fees. As all of these external legal processes were in progress, the decision on their motion for court costs was denied. It was at this point that Canal+ finally let go, saying 'Let's call it quits, we won't appeal the judge's decision in your favor and you don't appeal the judge's decision on court costs.'

This was my project. This was my project, and I knew they were wrong. They were more wrong in their behavior leading up to the lawsuit than in how they defended themselves. These people had behaved so badly and so maliciously and so stupidly and so inaccurately. Every decision they made was wrong. This is the single thing they have ever said from day one that makes any kind of sense.<sup>44</sup>

The emotional strain throughout this entire process not only exhausted Steven and Robert, but the financial drain was enormous. When Canal+ finally announced their decision to avoid appealing the motion to dismiss, the entire lawsuit process had cost Lutvak and Freedman approximately \$400,000. At the beginning of the process, Lutvak emailed the people of means he had familiarity with saying, "I'm in a terrible position. This dream that I've had, which is really the highlight of my career thus far, has just been felled. Can you lend me something, can you gift me

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<sup>43</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

<sup>44</sup> *Ibid*

something?" Surely enough, people stepped up and delivered financial aid, and Steven was gifted with enough money to keep his attorney going. Additionally, Lutvak recorded an album of his songs, including one new one he wrote that year, which some people paid \$25.00 for and some people paid \$1000.00 for.

I had recorded a CD of my songs to raise money for the suit. In that year I had only written one new song. I'm usually much, much more productive than that, but I felt like my life was on hold.<sup>45</sup>

One donor, requesting anonymity, asked if they raised the money to pay off the suit could that count as an investment in the show, and later provided Lutvak and Freedman with the additional funds for front money for the production.

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<sup>45</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

## CHAPTER 4

### A GENTLEMAN'S GUIDE TO LOVE AND MURDER

#### I. *A Gentleman's* Life Post-Lawsuit

Set in England in 1909, Steven created a musical idiom to reflect not only the era, but also the social structures and class distinctions inherent in Edwardian society. The score ranges from pieces evocative of Gilbert and Sullivan and British Music Hall to the gorgeous melodies of Chopin.

I wanted to keep the score consistent but at the same time spread it as wide as could be. I wanted to have one foot in the classical and one foot in the music hall because it is a show about class.<sup>46</sup>

Each character in *A Gentleman's Guide to Love and Murder* possesses a distinct musical persona. The distinctions in the musical persona of all eight members of the D'Ysquith family are made only more evident by the device of one actor portraying these disparate characters. Alec Guinness' film career was launched by this portrayal, and Jefferson Mays won an Outer Critics Circle and Drama Desk Award and was also nominated for a Tony Award for his portrayal in the current musical production. Each of these characters, after being introduced, has a brief moment to make an impression upon the audience before they are killed off. As just one actor is playing all roles (and both genders) it is important that the music clarifies just who he is at the moment of their demise.

As discussed before, the idea of 'class' is pivotal to the story. The story unfolds from the viewpoint of a man condemned to die for his crimes, crimes revealed to the audience through his memoirs. The protagonist is Monty Navarro, the son of a Castilian musician and a noble mother disinherited by her affluent family, the D'Ysquiths, upon her marriage to the lowly minstrel. Upon his mother's death, Monty discovers he is ninth in line to inherit the Earldom of Highhurst through her lineage. He writes to Lord Asquith D'ysquith Sr., the head of the D'Ysquith family banking house, to request employment. Monty's maternal forefathers possess no interest in recognizing him, as they blatantly tell him in a rather scathing letter. Following the refusal of his family to grant

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<sup>46</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

him his birthright, Monty is rejected by his social-climbing lover, Sibella, for a wealthier man, leaving Monty despondent and out of sorts. Monty resolves to visit the family estate at Highhurst, and then to visit with the family clergyman, Reverend Lord Ezekial D'Ysquith. After a climb to the top of the bell tower at the family ancestral church, Ezekial tells Monty he cannot interfere in family matters, denying Monty any aid. At that moment, fortune presents Monty with an opportunity to help the Reverend regain his balance, and at the auspicious moment, Monty chooses to not help him and the Reverend falls to his death. Monty then decides to pursue his revenge by killing the seven other heirs ahead of him, paving the way for his succession. His victims, all played by one actor, are a vicar, the banking family's rakehell son and his mistress, a country squire with suspect tastes and a passion for bee keeping, a philanthropist looking for a cause, a Major Lord General who is obsessed with fitness, an actress of uncertain talents, the elderly head of the family Banking House and the present Earl Lord D'Ysquith. As Monty moves through the hierarchy of his own ancestors, eliminating his kin on the road, and closing in on the title, he gets a position at the D'Ysquith Family Banking House. Thus creating a rise in his stature and fortunes making him suddenly desirable once more to his former lover, Sibella. The final heir, Lord D'Ysquith is poisoned, however not by Monty and not for a lack of Monty's trying, Monty succeeds in attaining the title of Earl. Arrested for the crime he did not commit, Monty's life is spared in the eleventh hour when conflicting stories by Phoebe and Sibella, both of whom accuse each other of the murder, lead the authorities to doubt Monty's involvement. Thus Monty's memoirs are returned to him and the musical ends with a distant D'Ysquith cousin preparing to murder his way to the top.

The Musical Numbers are as follows, with notation of pieces that remained from the first full presentation of the show at the Huntington Theater in Boston, MA.

#### Act 1

"A Warning to the Audience" – Ensemble \*

"You're a D'Ysquith" – Miss Shingle and Monty

"I Don't Know What I'd Do" – Sibella \*

"Foolish to Think" – Monty \*

“A Warning to Monty” – Ensemble

“I Don’t Understand the Poor” – Lord Adalbert and Ensemble \*

“Foolish to Think (Reprise)” – Monty \*

“Poison in My Pocket” – Monty, Asquith Jr. and Miss Barley \*

“Poor Monty” – Sibella and Ensemble \*

“Better With a Man” – Henry and Monty \*

“Inside Out” – Phoebe and Monty

“Lady Hyacinth Abroad” – Lady Hyacinth and Ensemble

“The Last One You’d Expect” – Company \*

## ACT II

“Why Are All the D’Ysquith’s Dying” Lord Adalbert and Mourners \*

“Sibella” \_ Monty\*

“I’ve Decided to Marry You” –Phoebe, Sibella and Monty \*

“Final Warning” – Ensemble \*

“Poison in My Pocket (Reprise)” – Monty \*

“Looking Down the Barrel of a Gun” – Lord Adalbert \*

“Stop! Wait! What?!” \_ Monty \*

“That Horrible Woman” – Sibella, Phoebe, Detective, Magistrate and Guard

“Finale” – Company \* <sup>47</sup>

The prevailing idea of class distinction is addressed in Act One in a marvelous song called “I Don’t Understand the Poor.” We meet the current and agitated Duke of D’ysquith as his estate is being over-run by tourists. Musically, it has a bombastic and rigid feel. There is also a salute to Gilbert and Sullivan in the addition of the ancestors (singing portraits) who repeat the ending lyric to each of the verses, rather like “I Am The Very Model Of A Modern Major General” in *Pirates of Penzance*.

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<sup>47</sup> Manuscript courtesy of Steven Lutvak

**“I DON’T UNDERSTAND THE POOR”**

**LORD ADALBERT**

HANDS OFF THAT SWORD!

PUT DOWN THAT BOOK!

ISN'T IT ENOUGH WE LET YOU LOOK?!

I HATE TO DASH YOUR FUTILE LITTLE HOPES, BUT YOU PAY YOUR SIXPENCE,

AND STAY BEHIND THE ROPES!

I CRINGE WHEN EVERY COBBLER,

OR BUTCHER, OR FARMER

COMES TOUCHING MY BANNISTERS,

BANGING MY ARMOUR.

THEY FINGER EVERY FINIAL. THEY POKE YOUR CORNERSTONE. WHO'D WANT TO BE

REMINDED OF WHAT THEY'LL NEVER OWN?

THOUGH MY POLITICS ARE PURELY DEMOCRATICAL. I FIND THE SPECIES, FRANKLY,

PROBLEMATICAL.

I DON'T UNDERSTAND THE POOR. I DON'T UNDERSTAND THE POOR. THE LIVES THEY

LEAD

OF WANT AND NEED,

I SHOULD THINK IT WOULD BE A BORE.

IT SEEMS TO BE NOTHING BUT STUBBORNNESS. WHAT'S ALL THE SUFFERING FOR?

TO BE SO DEBASED

IS IN TERRIBLE TASTE.

I DON'T UNDERSTAND THE POOR.

**ANCESTRAL PORTRAITS**

TO BE SO DEBASED

IS IN TERRIBLE TASTE,

I DON'T UNDERSTAND THE POOR.



**LORD ADALBERT**

I DON'T UNDERSTAND THE POOR.  
AND THEY'RE CONSTANTLY TURNING OUT MORE. EVERY FESTERING SLUM  
IN CHRISTENDOM  
IS DISGORGING ITS YOUNG BY THE SCORE.  
I SUPPOSE THERE ARE SOME WITH AMBITION. SAY, THE PICKPOCKET, BEGGAR, OR  
WHORE. FROM WHAT I CAN TELL  
THEY DO QUITE WELL.  
THEY'RE RISING ABOVE  
AND IT'S WORK THEY LOVE.  
BUT I DON'T UNDERSTAND THE POOR.

**ANCESTRAL PORTRAITS**

THEY'RE RISING ABOVE  
AND IT'S WORK THEY LOVE.  
BUT I DON'T UNDERSTAND THE POOR.

**LORD ADALBERT**

WHERE'S THE DIGNITY?

**ANCESTRAL PORTRAITS**

WHERE'S THE DIGNITY?

**LORD ADALBERT**

WHERE'S THE PRIDE?

**ANCESTRAL PORTRAITS**

WHERE'S THE PRIDE?

**LORD ADALBERT /ANCESTRAL PORTRAITS**

THE IGNOMINITY! IGNOMINITY?

### **LORD ADALBERT**

PUTTING THE LAME AND THE HALT ASIDE, WHY ACCEPT CHARITY?  
I AM PERPLEXED BY THEIR ATTITUDE.  
I CONTEND WE EXTEND THEM  
TOO MUCH LATITUDE.  
MY TENANTS HAVE NO EXCUSE,  
AT CHRISTMAS I GIVE THEM A GOOSE. WHERE'S THE INTEGRITY?  
WHERE'S THE GRATITUDE?  
I DON'T UNDERSTAND THE POOR.  
HOW I LONG FOR THE DAYS OF YORE, WHEN NARY A VASSAL  
STEPPED INTO YOUR CASTLE;  
THEY KNEW NOT TO DARKEN YOUR DOOR. NOW THEY BARGE IN EVERY TUESDAY,  
WITH A SICKENING, THICKENING ROAR. WHY CLATTER AND TRAMPLE?  
SET AN EXAMPLE!  
WE TEACH THEM TO READ,  
BUT DO THEY SUCCEED?  
WHEN THEY'RE HUNGRY AND FRAIL,  
WE FEED THEM IN JAIL!  
WE SEND THEM OFF TO WAR!  
I DON'T UNDERSTAND--  
I'M NOT BEING GRAND!  
I DON'T UNDERSTAND THE POOR!

### **ANCESTRAL PORTRAITS**

I DON'T UNDERSTAND--  
I'M NOT BEING GRAND!

I DON'T UNDERSTAND (THE)--

**LORD ADALBERT**

THOUGH THERE'S ONE I ADMIT I ADORE.

HE'S MISSING A LEG,

BUT A VERY GOOD EGG,

A GENTLEMAN THROUGH TO THE CORE. HE MAY BE A BIT OF A DRINKER,

HE CAN OFTEN BE FOUND ON THE FLOOR. THROUGH ALL OF HIS PAINS,

HE NEVER COMPLAINS.

HE'S BRIGHT AND ASTUTE,

A SHAME THAT HE'S MUTE.

ACCORDING TO MOTHER

HE MAY BE MY BROTHER,

A FACT WE ALL CHOOSE TO IGNORE. BUT I DON'T UNDERSTAND--

I'M SENSITIVE AND

I DON'T UNDERSTAND THE POOR!

**ANCESTRAL PORTRAITS**

I DON'T UNDERSTAND--

I'M SENSITIVE AND

I DON'T UNDERSTAND--

**LORD ADALBERT**

THEY'RE A POX ON THE LAND!

**ANCESTRAL PORTRAITS**

I DON'T UNDERSTAND--

**LORD ADALBERT**

I DON'T UNDERSTAND--

**LORD ADALBERT & PORTRAITS**

I DON'T UNDERSTAND THE POOR!

## **LORD ADALBERT**

REALLY, I DON'T!<sup>48</sup>

Robert and I cracked each other up writing this, we had absolutely the best time. And one of the great things about sitting in the audience now is that they are laughing at the same things we found so funny.<sup>49</sup>

It is also interesting to note that there are only two musical ballads in this show and both of them belong to Monty. What makes them interesting, is that they are the only times in which he is really telling the truth. In the opening ballad, "Foolish to Think" we are made aware of Monty's insecurities and the chip that he is carrying around on his shoulder because of the rejection he has dealt with from the D'Ysquith family and by Sibella, the woman he has loved his entire life. This rejection by the family for his low birth and again by Sibella for his low birth and lack of prospects is a crushing blow.

### **"FOOLISH TO THINK"**

#### **MONTY**

FOOLISH TO THINK SHE WOULD MARRY YOU. WHY WOULD SHE SINK SO LOW?  
YOU'VE ONLY A CLAIM  
TO A NOBLE OLD NAME.  
WHO COULD BLAME HER FOR SAYING "NO"? FOOLISH TO DREAM SHE'S IN LOVE WITH  
YOU. YOU'RE A FOOL TO BELIEVE THAT KISS.  
THE MAN WHO INSPIRES  
SUCH BREATHLESS DESIRES,  
WELL, THAT'S THE MAN TO DISMISS.  
FOOLISH TO HOPE SHE WOULD EVER SEE ALL THAT YOU REALLY ARE.  
A MAN WITH NO TRADE  
IS NO MATCH, I'M AFRAID, FOR A BLADE IN A MOTOR CAR. HE'LL GO FAR...

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<sup>48</sup> Manuscript courtesy of Steven Lutvak

<sup>49</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

FOOLISH TO PRAY YOU WILL EVER BE THE FELLOW SHE MIGHT PREFER. LET'S HAVE A  
DRINK,  
IT'S FOOLISH TO THINK  
YOU'LL EVER STOP LOVING HER.  
ON A MYTHICAL SCALE  
THE D'YSQUITHS PREVAIL  
ON A HILL JUST OUTSIDE OF TOWN;  
IN A CASTLE THEY LOVE  
THAT IS SO FAR ABOVE,  
THEY'RE ACCUSTOMED TO LOOKING DOWN.  
OH, IF ONLY THEY KNEW  
WHAT THE RIGHT WORDS WOULD DO  
TO ERASE THE DISGRACE OF THE PAST. AND IF ONLY THEY'D SEE  
WHAT A D'YSQUITH I'D BE,  
THEY MIGHT FACE THEIR MISTAKES AND  
BUT THE FAM'LY ORDAINS  
THAT THE BLOOD IN MY VEINS  
IS MORE THAN A TRIFLE IMPURE. THEY CONSPIRED WITH EACH OTHER CONDEMNING  
POOR MOTHER  
TO A HEART-BREAKING LIFE SHE COULD  
WITH NO CONSCIENCE OR CARE  
THEY DISPOSED OF AN HEIR  
TO THEIR GLORIOUS FAMILY TREE.  
DO I LIE DOWN AND DIE,  
OR DETERMINE TO TRY  
TO ALTER THE COURSE OF MY DESTINY? OTHERWISE, WHAT WILL BECOME OF ME?

AM I FOOLISH TO THINK I COULD EVER WILL I NEVER BE  
MORE THAN I AM TODAY?  
I CAN SEE ME AS  
EMBRACE ME AT LAST.  
HARDLY ENDURE.  
BE,  
A MAN OF RESPECT  
YOU COULD NEVER DETECT  
HAD ONCE BEEN SO HEARTLESSLY CAST AWAY.  
AM I FOOLISH TO DREAM I'LL BE EARL ONE DAY, A TOWERING MAN AMONG MEN?  
THEN WHO COULD DENY  
NOW AND THEN PIGS CAN FLY,  
WHO WILL LOOK FOOLISH THEN? WHO WILL LOOK FOOLISH THEN? <sup>50</sup>

The second ballad that Monty sings is in Act II. Sibella is now Monty's mistress as his prospects have improved so greatly. She is disgruntled that she is not free to marry him, and that he is now involved with a woman whose station is far above her own. Monty has the upper hand in their relationship, and in this piece tells her why he loves her, despite all her flaws. The piece is also interesting musically because it speaks to the elusive quality of Sibella. Steven has captured this elusive quality in the lyrics, leaving the audience with the impression that although she is now Monty's mistress, she is always slipping through his fingers and is just out of his grasp.

**"SIBELLA"**

**MONTY**

THIS IS A NOSE THAT BELONGS ON A COIN.  
AND THERE'S THAT SMILE WITH A SECRET INSIDE. AND HERE ARE TWO EYES THAT  
ARE BRIGHT  
WITH A MISCHIEVOUS LIGHT

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<sup>50</sup> Manuscript courtesy of Steven Lutvak

YOU TRY BUT CAN'T QUITE HIDE.  
OH, THERE'S THAT VOICE WITH THE PROMISE OF SIN.  
AND OH, THOSE LIPS ARE A PROMISE OF BLISS. I KNOW THAT YOUR EMBRACE  
IS A TREACHEROUS PLACE.  
THERE'S DANGER IN YOUR KISS.  
THIS IS THE FACE OF A WOMAN  
A MAN COULD EASILY WORSHIP  
FOR ALL OF HIS DAYS.  
BUT A MAN COULD AS EASILY LOSE HIS SANITY DECIPHERING YOUR GAZE.  
OH, YOU ARE VAIN,  
AND YOU'RE HEARTLESS, AND YET,  
I CAN FEEL IN YOU A SHADE OF SADNESS THAT'S BARELY DETECTABLE.  
THAT I STILL WANT YOU AT ALL  
I MAY LIVE TO REGRET.  
YOU'RE DECEITFUL.  
YOU'RE DELECTABLE.  
YOU SEE THE FATE OF A MAN  
WHO HAS HAD THE MISFORTUNE  
TO SPEND HIS LIFE CAUGHT IN YOUR SWAY. I SEE SIBELLA.  
MY SIBELLA.  
AND I LIKE HER THAT WAY.  
YES, I LIKE HER JUST THAT WAY.  
AND I WANT YOU THAT WAY.<sup>51</sup>

The most memorable song from the show, selected for performance at the Tony Awards and Macy's Annual Thanksgiving Day Parade, "I've Decided to Marry You" is a trio sung by Phoebe, Sibella and Monty. Once again, Steven's lyric writing is a brilliant combination of unexpected rhyming and wit. He interweaves the characters emotional needs spectacularly with

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<sup>51</sup> Manuscript courtesy of Steven Lutvak

the storytelling and lightning fast lyrics. The clever staging of the number bolsters its musical and comedic genius, utilizing the classic comedic convention of an in-and-out-of-doors sequence, as Monty attempts to juggle the separation of the women, creating created a little piece of theater magic.

**“I’VE DECIDED TO MARRY YOU”**

**PHOEBE**

MR. NAVARRO! FORGIVE MY INTRUSION!

**MONTY**

This is so unexpected...

**PHOEBE**

I NEEDED TO SEE YOU,  
AND SEE YOU TODAY!

**MONTY**

Yes, of course...

**PHOEBE**

MR. NAVARRO!

MR. NAVARRO!

I HAVE ARRIVED AT A STUNNING CONCLUSION, AND I FEARED I WOULD LOSE MY  
RESOLVE IF I DIDN’T COME HERE DIRECTLY TO SAY:

I’VE DECIDED TO MARRY YOU!

I’VE DECIDED TO MARRY YOU!

I’VE DECIDED THOUGH HENRY’S GONE

THAT LIFE GOES ON FOR ME!

I HAVE THOROUGHLY THOUGHT IT THROUGH, AND THE MAN THAT I WANT IS YOU,  
THOUGH IT’S TRUE THERE ARE QUITE A FEW WHO’D STRONGLY DISAGREE!



NONETHELESS I WILL MARRY YOU!  
I CONFESS THAT I'M FRIGHTENED TO.  
BUT UNLESS I AM WRONG YOU LONG  
FOR LOVE AS MUCH AS I!  
THIS IS QUITE UNCONVENTIONAL,  
I ADMIT,  
BUT WHY SHOULD THAT MATTER A WHIT?  
AND IF YOU DO NOT SAY YES AT ONCE I THINK I'LL DIE!

**MONTY**

Miss D'Ysquith, you've rendered me speechless!  
May I call you Phoebe?  
(Sibella anxiously waits in the bedroom.)

**SIBELLA**

WHAT AM I DOING HERE?  
THIS COULD BE DANGEROUS.  
IF I'M DISCOVERED,  
IMAGINE THE SCANDAL, AND I COULDN'T HANDLE A SCANDAL SO RISIBLE. I'LL STAY  
INVISIBLE, STILL AS CAN BE.  
BUT WHAT'S GOING ON IN THERE? I CAN HEAR VOICES.  
I RECOGNIZE MONTY,  
BUT IS THAT A WOMAN?  
AND IF THAT'S A WOMAN,  
THEN WHAT IS SHE DOING HERE? IS IT THE SISTER?  
I WISH I COULD SEE!  
IF IT'S THAT SISTER,  
IT MIGHT JUST BE BUSINESS. IT'S FAMILY BUSINESS,  
AND NONE OF MY BUSINESS. BUT WHY IS SHE HERE

IN THE HOME OF A BACH'LOR?

OF COURSE, ONE COULD POINT OUT

THAT I'M HERE, AS WELL!

BUT DOES SHE NOT REALIZE THIS SITUATION

PUTS HER REPUTATION SEVERELY IN QUESTION? THE MEREST SUGGESTION WOULD

CAUSE A SENSATION! AND I CANNOT HEAR, WHICH IS HELL!

**PHOEBE**

I'LL BE WARNED NOT TO MARRY YOU!

**SIBELLA**

I COULD GO HOME

**PHOEBE**

I'LL BE SCORNEED IF I MARRY YOU!

**SIBELLA**

I SHOULD GO HOME.

**PHOEBE**

STILL, I'VE DECIDED

**PHOEBE & SIBELLA**

TO LIVE MY LIFE

**SIBELLA**

AND BE A WIFE

**PHOEBE & SIBELLA**

AGAIN!

**PHOEBE**

WHO'D BELIEVE HOW MY LIFE HAS TURNED?

**SIBELLA**

I SHOULD BE OFF.

**PHOEBE**

AFTER GRIEVING, I'VE QUICKLY LEARNED

**SIBELLA**

BUT HE MAKES ME LAUGH.

**PHOEBE**

THERE IS

**PHOEBE & SIBELLA**

NOTHING CAN BEND THE WILL

LIKE HALF-CASTILIAN MEN!

**PHOEBE**

AND THERE'S GOODNESS TO SPARE IN YOU.

**SIBELLA**

ISN'T THIS FUN?

**PHOEBE**

AND A GENTLENESS THERE IN YOU.

**SIBELLA**

ISN'T SHE DONE?

**PHOEBE**

YOU HAVE TAKEN A WOUNDED BIRD AND TAUGHT HER HOW TO FLY!

**SIBELLA**

FAM'LY BUSINESS, MY EYE!

**PHOEBE & SIBELLA**

THIS IS QUITE UNCONVENTIONAL,

IS IT NOT?

RATHER A TURN IN THE PLOT.

**PHOEBE**

AND SO WILL I BE YOUR FIANCEE?!

**SIBELLA**

WHY DON'T YOU SEND THE COW AWAY?

**MONTY**

PHOEBE, DARLING!

**PHOEBE & SIBELLA**

WHEN I RECALL THIS DAY

I THINK I'LL CRY!

(Sibella stumbles in the bedroom, making a noise.)

**PHOEBE**

That sound! Is there someone here?

**MONTY**

Oh, pay no attention, that's...that's my new manservant, he's...finding his way around.

(Monty opens the bedroom door a crack.)

**MONTY**

I'll be with you in a moment...Wadsworth. (to audience)

ISN'T THIS MADNESS?

WHO COULD FORSEE HOW

ONE TRICK OF TIMING COULD RUIN IT ALL?

ONE IN THE PARLOR,

ONE IN THE BEDROOM,

NOTHING BETWEEN THEM

BUT ME AND A WALL!

LOOK AT PHOEBE!

NOBLE AND PIOUS,

MY ESTEEM FOR HER ONLY GROWS.

BUT WHEN I AM WITH PHOEBE

I AM ON FIRE THINKING OF

SIBELLA!

FULL OF DESIRE,  
PASSION, AND DARE  
LOVE!  
BUT WHEN I'M WITH  
WHOM DO I ADMIRE?  
NONE BUT PHOEBE!  
PERFECT AND LOVELY!  
WHO COULDN'T LOVE HER?  
HEAVEN KNOWS!

ROUND AND ROUND AND ROUND IT GOES!

(turning to Phoebe)

HOW HAPPY I'D BE TO BE AT YOUR DISPOSAL,  
MY DARLING, OF COURSE, I ACCEPT YOUR PROPOSAL!

**PHOEBE**

NOW WE SHOULD KISS!

**MONTY**

THAT WOULD BE BLISS!

**PHOEBE**

DARLING, BUT FIRST I'LL SAY THIS:  
I'VE DECIDED TO MARRY YOU!

**MONTY**

PHOEBE!

**SIBELLA**

WHAT ARE THEY DOING?

**PHOEBE**

I'VE DECIDED TO MARRY YOU!

**MONTY**

SIBELLA!

**SIBELLA**

WHAT ARE THEY DOING?!

**PHOEBE**

LET THE TRUMPETER CALL,  
A WALL WILL

**SIBELLA**

(at the same time)

I WISH THIS WALL WOULD

**MONTY**

(at the same time)

PHOEBE!

**PHOEBE, SIBELLA, MONTY**

FALL AND SET ME FREE!

**MONTY**

THEN AGAIN, THERE'S SIBELLA!

**SIBELLA**

MONTY!

**PHOEBE**

I'VE DECIDED TO MARRY YOU!

**MONTY**

YES, I'D BE HONORED TO MARRY YOU!

**SIBELLA**

MONTY, OH, MONTY!

**MONTY**

I WILL MARRY YOU, PHOEBE!

**PHOEBE**

I WILL MARRY YOU!

**PHOEBE, MONTY, SIBELLA**

LOOK WHAT YOU'VE DONE TO ME!

**PHOEBE**

MONTY!

**MONTY**

PHOEBE!

**SIBELLA**

MONTY!

**MONTY**

WADSWORTH!

**PHOEBE**

MONTY! MONTY!

**SIBELLA**

MONTY! MONTY!

**PHOEBE & SIBELLA**

MONTY! MONTY! MONTY! MONTY!

(Sibella opens the door to peek.)

**MONTY**

(to Phoebe)

I'M GRATEFUL, INDEED,

FOR YOUR GRACIOUS BESTOWMENT!

(to Sibella)

YES, WADSWORTH, I TOLD YOU,

I'LL BE JUST A MOMENT!

(He slams the door on her)

**PHOEBE**

NOW, MONTY, DEAR, I THINK I NOW SHOULD GO!

**MONTY**

OH? OH!

**PHOEBE**

BUT I STILL WANT TO MARRY YOU!

**MONTY**

EVEN SO...

**PHOEBE**

I'VE DECIDED TO MARRY YOU!

**SIBELLA**

JUST GO!

**PHOEBE**

HOW I'M LONGING TO MARRY YOU!

**SIBELLA**

HELLO!

**MONTY**

YES, I'M DELIGHTED TO MARRY YOU,

MARRY YOU, MARRY—

A SHAME YOU MUST--

**PHOEBE**

(at the same time)

I'VE DECIDED TO MARRY YOU,

MARRY YOU, MARRY--

A SHAME I MUST--

**ALL**

GO!

GO!



**SIBELLA**

GO!

**MONTY**

GO!

**SIBELLA**

GO!

**PHOEBE**

I'LL—

**ALL**

GO! <sup>52</sup>

## II. *A Gentleman's* On the Boards

As planned, *A Gentleman's Guide To Love and Murder* first made it's way to Hartford Stages in Connecticut where it was put through the refiner's fire. Underscoring, choreography, scenic and lighting designs were created, as well as the impossibly quick costume tracking for Jefferson Mays, as he literally changed costumes and characters in the briefest of moments. When interviewed, Jefferson remarked that when they began that process and he was still learning the track, he would race offstage and be stripped and redressed in seconds by a group of people and he had to have his dressers tell him who he was before he went back onstage. The reviews for this production began, and they were shining.

When you have the hysterically funny Jefferson Mays playing the eight odious members of the entitled D'Ysquith family and Ken Barnett as the charming cad who croons some killer tunes, you have one wickedly delicious show.”<sup>53</sup>

*A Gentleman's Guide to Love and Murder* had its world premiere in March of 2013 at The Old Globe Theater in San Diego. The musical based on the book *Israel Rank* by Roy Horniman, was directed by Darko Tresnjak and choreographed by Peggy Hickey in a co-production with Hartford Stage. The cast included Jefferson Mays (The D'ysquith Family), Ken Barnett (Monty Navarro), Sibella Howard (Lisa O'Hare), Chilina Kennedy (Phoebe D'Ysquith), Rachel Izen (Miss

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<sup>52</sup> Manuscript courtesy of Steven Lutvak

<sup>53</sup> Rizzo, *Hartford Courant*, October 17, 2012

Shingle), Heather Ayers (Lady Eugenia/Miss Barley), Kendal Sparks (Mr. Gorby), Kevin Ligon (Tom Copley), Catherine Walker (Tour Guide) and Price Waldman as (Detective).

Again the reviews were ecstatic.

The remarkable team of Robert L. Freedman and Steven Lutvak has crafted a show that is sharp, surprising and entertaining. And at its helm is the great Darko Tresnjak, an old friend I'm delighted to welcome back to the Globe. Darko's partners in crime are the stellar Ken Barnett and Jefferson Mays, two of the most exciting stage actors in America, whose deft and hilarious performances are real tours de force.<sup>54</sup>

You see a great number in a musical and stop the show with rabid applause. But how many times have you really wanted the show to stop – and have them repeat the number on the spot.<sup>55</sup>

All the buzz about *A Gentleman's Guide to Love and Murder*, the clever new musical comedy pastiche that seems to be wending its Edwardian way to Broadway, is redeemed by the ingenious versatility and quick change athleticism of actor Jefferson Mays.<sup>56</sup>

Lutvak and Freedman's persistence paid off, when on November 17<sup>th</sup>, 2013 after a month of previews, *A Gentleman's Guide to Love and Murder* opened on Broadway at the Walter Kerr Theater. Under the direction of Darko Tresnjak the company included: Jefferson Mays (The D'Ysquith Family), Bryce Pinkham (Monty Navarro), Lisa O'Hare (Sibella Howard), Lauren Worsham (Phoebe D'Ysquith), Jane Carr (Miss Shingle), Joanna Glushak (Eugenia and others), Eddie Korbich (Magistrate and others), Jeff Kready (Tom Copley and others), Jennifer Smith (Your Guide and others), Price Waldman (Inspector Pinckney and others) and Catherine Walker (Miss Barley and others). It is interesting to note that the only member of this company who performed in both versions was Price Waldman.

In a way, through the entire lawsuit I just kept thinking "I feel like Dorothy Gale in the Wizard of Oz... she says I just want to go home and she is sent home" and that's what I thought, I just want my little show to have it's shot, and it did again and again. We opened in Hartford and it was amazing, and then we were given the opportunity to play The Old Globe and it was incredible, and then we heard we were going to Broadway and we did and it opened to rapturous reviews. It reminds me of a song we sing at Passover, "Diyenu" in which we say...God if you had only given us this it would have been enough, but then you gave us this and that would have been enough.... You get the point."<sup>57</sup>

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<sup>54</sup> Hewitt, [www.Lajollalight.com](http://www.Lajollalight.com)

<sup>55</sup> Smith, *San Diego Reader*, March 20, 2013

<sup>56</sup> McNulty, *Los Angeles Times*, March 15, 2013

<sup>57</sup> Personal interview of Steven Lutvak by author, March 2012-December 2014

Not only were the reviews wonderful, the award nominations started to pour in. The 2014 Drama League Awards nominations were announced on April 23, 2014 and *A Gentleman's Guide to Love and Murder* was nominated for two, Distinguished Production of a Musical and Distinguished Performance Award For Jefferson Mays, which he won.<sup>58</sup> *A Gentleman's Guide to Love and Murder* was nominated for ten Outer Critics Circle Awards, including: Outstanding New Broadway Musical (won), Outstanding Book of a Musical (Robert Freedman- won), Outstanding Actor in a Musical, (Bryce Pinkham and Jefferson Mays were both nominated (Jefferson-Won), Outstanding Director of a Musical (Darko Tresnjak-won), Outstanding Lighting (Phillip S. Rosenberg), Outstanding New Score (Steven Lutvak-music and lyrics) and (Robert Freedman- lyrics), Outstanding Featured Actress in a Musical (Lisa O'Hare), Outstanding Choreographer (Peggy Hickey), Outstanding Set Design (Alexander Dodge) and Outstanding Costume Design (Linda Cho).<sup>59 60</sup>

On April 25<sup>th</sup> the nominations were announced for the Drama Desk Awards, and *A Gentleman's Guide to Love and Murder* received eleven Drama Desk Awards nominations.<sup>61</sup> These included Outstanding Musical (it won), Outstanding Book of a Musical (Robert Freedman-won), Outstanding Music (Steven Lutvak), Outstanding Lyrics (Robert L. Freedman and Steven Lutvak-they won), Outstanding Actor in a musical (Jefferson Mays and Bryce Pinkham- Jefferson won), Outstanding Featured Actress in a Musical (Lauren Worsham-won), Outstanding Director of a Musical (Darko Tresnjak-won), Outstanding Orchestrations (Jonathan Tunick), Outstanding Set

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<sup>58</sup> The Drama League Awards originated in 1922, and are America's oldest theatrical awards. The entire theatrical community is involved in these nominations and it is the only major award given that has the involvement of so many members. There are five major categories including: Outstanding Production of a Play, Outstanding Revival of a Play, Outstanding Production of a Musical, Outstanding Revival of a Musical and the Distinguished Performance Award.

<sup>59</sup> "Outer Critics Circle." Outer Critics Circle Awards for 2013/2014. May 22, 2014.

<sup>60</sup> The Outer Critics Circle Awards began in 1949. Involved in these nominations are the theatre critics who review for national publications, out-of-town newspapers and other news outlets outside of New York City. They are given in celebration of theatrical performances on and off-Broadway.

<sup>61</sup> Since 1955 the Drama Desk Awards have been given annually in recognition of exceptional performances in New York City theatrical productions on, Off and Off-Off Broadway.

Design of a Musical (Alexander Dodge), Outstanding Sound Design of a Musical (Dan Moses Schrier) and Outstanding Projection Design (Aaron Rhyne-won).<sup>62</sup>

On April 29, 2014 the Tony Awards nominations were announced and *A Gentleman's Guide to Love and Murder* came away with the most nominations of the season.<sup>63</sup> These Tony nominations included: Best Musical (won), Best Book of a Musical (Robert L. Freedman-won), Best Original Score (Steven Lutvak music and lyrics and Robert L. Freedman lyrics), Best Actor in a Musical (Jefferson Mays, Bryce Pinkham), Best Featured Actress in a Musical (Lauren Worsham), Best Direction of a Musical (Darko Tresnjak-won), Best Orchestrations (Jonathan Tunick), Best Scenic Design (Alexander Dodge) and Best Costume Design (Linda Cho-won).<sup>64</sup> *A Gentleman's Guide to Love and Murder* was also nominated for a Grammy Award for Best Musical Theater Album.<sup>65</sup>

The little show that was faced with every roadblock imaginable, from intransigent producers, to lawsuits to potential producers passing away, made the journey to Broadway. It was lauded and praised all across the country and dominated the theater award season. It is currently still running on Broadway and plans are in the making for a National Tour in the Fall of 2015. Steven Lutvak has now become one of the most sought after composers in the country and has just signed on to compose the musical adaptations of *The Princess Bride*.<sup>66</sup>

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<sup>62</sup> 2014 Drama Desk Awards.' June 2, 2014

<sup>63</sup> The Tony Awards (Antoinette Perry Award for Excellence in Theatre) are presented annually by the American Theater Wing recognizing excellence in live Broadway theatre and are considered America's highest honor in the theater community.

<sup>64</sup> "2014 Tony Award Winners." June 9, 2014.

<sup>65</sup> "2014 Grammy Award Nominees." The Grammy's. January 7, 2014. Accessed February 23, 2015.

<sup>66</sup> Mandell, "The Week in New York Theater, November 11, 2013

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APPENDIX A  
CEASE AND DECIST LETTER

FITELSON, LASKY, ASLAN, COUTURE & GARMISE

ATTORNEYS AT LAW

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**VIA FIRST CLASS MAIL AND EMAIL**

August 15, 2008

Nancy A Rose, Esq.  
David Berlin, Esq.  
1790 Broadway, 20th Floor  
New York, NY 10019

Jess Drabkin, Esq.  
Gil Karson, Esq.  
Grubman Indursky & Shire, P.C.  
152 West 57th Street  
New York, NY 10019

**Re: Kind Hearts and Coronets**

Ladies and Gentleman:

I am writing to you at the express request of my client, StudioCanal Image UK, Ltd. ("Canal+") in connection with various unauthorized activities of your respective clients, Robert L. Freedman ("Freedman") and Steven Lutvak ("Lutvak"), in connection with a live musical stage adaptation (the "Adaptation") of the film "Kind Hearts and Coronets" (with its screenplay and ancillary materials, the "Film"), which rights are held by Canal+. Your clients have recently engaged in the unauthorized copying and distribution of the Adaptation, as well as the performance thereof. Freedman was, in fact, given notice through his attorney over two weeks ago, well before the most recent known infringement of Canal+'s rights, that Canal+ was now pursuing other avenues for the stage exploitation of the Film, and that he was to immediately cease and desist from dealing with the Adaptation in any medium, and he has proceeded in open defiance of that notice.

These actions constitute a clear infringement of my client's rights; in addition, such activities place your clients at peril in connection with other ongoing live stage developments based on the Film by and on behalf of Canal+. Accordingly, your clients are to immediately cease and desist from the exercise of any rights based on or derived from



the Film, including, without limitation, any further attempts to modify the Adaptation, to distribute or exploit the Adaptation in any medium, now know or hereafter discovered, or to perform any excerpts from or elements of the Adaptation (including, without limitation, in any cabaret or non-professional or audition setting) which are based on or are derived from or refer to any elements of the Film, including, without limitation, its title, the screenplay and film images, the characters, their names and any dramatic situations identifiable with or based on the Film. In view of the other significant activities of Canal+ in connection with the Film, your clients must immediately modify their websites and all similar publicity and press materials, in any medium, to delete any suggestion that they have any further involvement with the Film or its adaptation for the stage. They must, in addition, delete all photos or other written material other than bare narrative in connection with third party awards, and if they retain any references to the Adaptation, the website must state clearly and prominently, to my client's satisfaction, that your clients have no rights to adapt or perform such a musical, and that any such rights can only be acquired through contacting StudioCanal Image U.K. at 1 Place du Spectacle, 92863, Issy Les Moulineaux, France, Attn: Ronald H. Halpern.

Your clients further should immediately return to this office all copies of any CDs and scripts that they hold, other than one copy for reference which they may hold provided it is never circulated or copied.

This letter is not intended to be either a complete summary of either the facts or legal position and claims of my client. My client expressly reserves all of its rights and remedies in connection with any violations of its rights both at law and equity, and will protect those rights vigorously.

Sincerely,



Richard Garmise

cc: Peter Hagan

APPENDIX B  
JUDGE HOLWELL'S DECISION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CANAL+ IMAGE UK Ltd.,

Plaintiff,

-against-

STEVEN LUTVAK and ROBERT L. FREEDMAN,

Defendants.

10 Civ. 1536 (RJH)

Richard J. Holwell, District Judge:

Defendants Steven Lutvak and Robert L. Freedman (“Defendants”) move to dismiss claims by Canal+ Image UK Ltd. (“Canal+”) for infringement of Canal+’s copyright in the film *Kind Hearts and Coronets* (the “Film”) as well as for breach of a contract regarding the rights to develop a stage musical adaptation of that film. For the reasons that follow, the Court finds that no reasonable jury could find that Defendants’ musical is substantially similar to the protectible aspects of the Film and that the Copyright Act preempts a claim for breach of contract in the circumstances of this case. Accordingly, Defendants’ motion is granted.

**BACKGROUND**

Roy Horniman’s novel *Israel Rank* (“the Novel”) was first published in 1907. The Novel, which has passed into the public domain, is written in the form of the prison memoirs of a man condemned to death. It tells the story of its eponymous protagonist, the son of Jewish father and a noble mother whose marriage to a Jewish man caused her family, the Gascoynes, to disinherit her. The protagonist is reared to be acutely aware of

his disinheritance, an awareness that turns to vengeance when he is rejected from a position at the family's banking house and by a social-climbing lover, Sibella, who marries a more promising man. The protagonist then hatches a plan to murder the eight people between him and the family's noble title. The protagonist begins by murdering the heir who refused him the position at the banking house and his mistress and then kills six other Gascoynes, several in disturbing fashion but all without detection. Along the way, as he moves closer to the Gascoyne title, the protagonist joins the banking house and his increased stature and wealth enable him to have an affair with his former flame, Sibella, and marry the sister of one his victims. When the protagonist takes the final step and poisons Lord Gascoyne himself, he takes the title but is arrested for the crime. However, the protagonist is exonerated when a governess at the family's estate falsely confesses to the murder because she has fallen in love with the protagonist.

In 1949, Ealing Studios released the Film, a comic adaption of the Novel starring Dennis Price as the protagonist with Valerie Hobson as his wife and Joan Greenwood as his lover. In one of his most memorable supporting roles, Sir Alec Guinness plays each of the protagonist's victims. The Film tells essentially the same story as the Novel, with a few differences described in more detail below. Canal+, however, alleges that "having all of the murder victims played by the same leading comic actor is central to the artistic expression of the Film" and "affects, and is inextricably intertwined with, not just the tone but all of the dramatic situations in the Film, including its 'total concept and feel.'" (Compl. ¶ 20.) Canal+ owns the copyrights to the Film pursuant to valid registration number PA-931591.

Defendants are a lyricist and a songwriter. On April 1, 2003, Canal+ and Defendants entered into a licensing agreement (the "Agreement") pursuant to which Canal+ provided Defendants with "the exclusive authorization, *to the extent of the interests of [Canal+]* . . . to

adapt the Film . . . as a live stage musical presentation . . .” (emphasis added). The authorization extended through October 1, 2004, at which time Defendants were to provide Canal+ with all materials necessary for Canal+ to decide whether to produce the “live stage musical presentation.” If Canal+ elected to do so, it would “have the sole right to enter into agreements to . . . present the Play with [Defendants] on terms to be negotiated in good faith.” However, if Canal+ elected not to produce the play, the Agreement provided that Defendants’ “rights [t]hereunder shall immediately terminate” and Defendants “shall immediately thereafter cease dealing in and with any materials written or created by you which represent, incorporate or embody the Film or any elements in the Film, including without limitation the text, characters, and situations in the Film, all of which elements shall be deemed to have reverted to [Canal+].”

Defendants submitted materials as required by the Agreement pursuant to releases dated September 1, 2004 which incorporated the terms of the Agreement. (Garmise Aff. Exs. A, B.) Canal+ decided not to produce Defendants’ live musical adaption. However, Defendants proceeded with developing their adaption (“the Musical”) which appears to have been variously titled *Kind Hearts and Coronets*, *The Truth About Monty*, and, ultimately, *A Gentleman’s Guide to Love and Murder*. According to several media sources to which Canal+ has referred the Court and whose veracity Defendants have not

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contested, Defendants planned to use one actor to play all of the victims in the Musical and previewed the Musical in that fashion.

Canal+ filed suit against Defendants on February 19, 2010 alleging copyright infringement and breach of contract. Canal+ alleges that Defendants “have simply taken the same musical which they previously called *Kind Hearts and Coronets*, changed the title and the names of certain characters, made other immaterial changes, and have now announced a pre-Broadway commercial production of that musical.” (Compl. ¶ 16.) Specifically, Canal+ alleges that “in the current re-titled musical [Defendants] have retained the style and occurrence of humorous, non-realistic deaths from the Film, deaths which are very different from the horrifyingly realistic ways in which the victims die in *Israel Rank*.” (*Id.* at 18.) Moreover, Canal+ alleges that “defendants’ re-titled musical has retained the central and most memorable expressive part of *Kind Hearts and Coronets*: the comedy inherent in having all eight of the aristocratic murder victims played by a single actor . . . .” (*Id.* at 19.)

Defendants have moved [18] under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for failure to state a claim for which relief can be granted.<sup>1</sup>

## LEGAL STANDARD

“Courts ruling on motions to dismiss must accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences in the plaintiff’s favor.”

*Dickerson v. Mut. of Am.*, 703 F. Supp. 2d 283, 290 (S.D.N.Y. 2010). However, “the

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<sup>1</sup> Defendants have also moved in the alternative for summary judgment under Federal Rule of Civil Procedure 56. Given that, for the reasons set forth below, it is proper under the law of this Circuit both to consider the works at issue and to resolve the substantial similarity question as a matter of law, there is no need to treat the instant motion as one for summary judgment.

tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Rather, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

“To prove infringement, a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff’s work; *and* (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiff’s.” *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999) (emphasis in original and quotation marks omitted). “[B]ecause the question of substantial similarity typically presents an extremely close question of fact, questions of non-infringement have traditionally been reserved for the trier of fact.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) (internal citation omitted). Nevertheless, “it is entirely appropriate for a district court to resolve that question as a matter of law, ‘either because the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar.’” *Id.* (quoting *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983)).

“When a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because ‘what is required is only a . . . comparison of the works.’” *Gaito*, 602 F.3d at 64 (quoting *Folio Impressions*,

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*Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)). Thus “where . . . the works in question are attached to a plaintiff’s complaint, it is entirely appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss, because the court has before it all that is necessary in order to make such an evaluation.” *Gaito*, 602 F.3d at 64.

Canal+ has not attached a copy of either the Film or the Musical to its complaint, nor has it formally incorporated either work by reference. But “when a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it solely relies and which is integral to the complaint, the court may nevertheless take the document into consideration in deciding the defendant’s motion to dismiss, without converting the proceeding to one for summary judgment.” *Int’l Audiotext Network, Inc. v. Am. Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (quotation marks omitted). Where Canal+ repeatedly characterizes or invokes the Novel, the Film, and the Musical in its complaint, alleges that the Musical “is nothing more than *Kind Hearts and Coronets* under a different name,” and has alleged a claim for copyright infringement which requires proof that the Musical is substantially similar to the Film, it is plain that the Novel, the Film, and the Musical are integral to the complaint. Accordingly, the Court will consider these works for purposes of Defendants’ motion to dismiss.



The Court will also consider the Agreement. “[W]here the claim is for breach of contract, the complaint is deemed to incorporate the contract by reference because the contract is integral to the plaintiffs’ claim.” *Verzani v. Costco Wholesale Corp.*, 641 F. Supp. 2d 291, 297-98 (S.D.N.Y. 2009). Though Canal+ has not attached a copy of the Agreement to the complaint or formally incorporated the Agreement by reference,

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Canal+ quotes from and relies upon that Agreement. (Compl. ¶¶ 10, 11, 12, 13, 23.) A plaintiff “cannot avoid the Court’s consideration of [a] document simply by failing to explicitly reference it . . . .” *RBS Holdings, Inc. v. Wells Fargo Century, Inc.*, 485 F. Supp. 2d 472, 477 (S.D.N.Y. 2007). The Agreement is therefore properly considered.

However, the Court will not consider what Canal+ calls an “expert” report by Dr. Michael Newton, a docent at the University of Leiden and the author of the only book-length study on the Film. (See Aff. of Michael Newton in Supp. of Pl.’s Opp’n to Defs.’ Mot. to Dismiss.) “The well-established general rule in this circuit has been to limit the use of expert opinion in determining whether works at issue are substantially similar.” *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992). It is true that “expert testimony may be used to assist the fact finder in ascertaining whether the defendant had copied any part of the plaintiff’s work,” but copying is not at issue. *Id.* Thus “it remains solely for the trier of fact to determine whether the copying was ‘illicit’” and “[s]ince the test for illicit copying is based upon the response of ordinary lay observers, expert testimony is thus ‘irrelevant’ and not permitted.” *Id.* While the Second Circuit has found expert testimony permissible in cases involving computer software, *see id.*, this is not such a case.

## DISCUSSION A. Copyright Infringement

“To prove infringement, a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff’s work; *and* (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiff’s.” *Hamil Am. Inc.*, 193 F.3d at 99 (emphasis in original and

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quotation marks omitted). Defendants have not contested actual copying. Rather, they contend that that the Musical is not substantially similar to the Film as a matter of law.

The requirement of substantial similarity reflects the proposition that “not all copying results in copyright infringement, even if the plaintiff has a valid copyright.” *Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001). Rather, the question “is whether ‘the copying is quantitatively and qualitatively sufficient’ to support a finding of *infringement*.”” *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999) (emphasis added) (quoting *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997)). Put another way, the question is “whether an average lay observer would . . . recognize the alleged copy as having been appropriated from the copyrighted work . . . .” *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995). Hence “[t]he standard test for substantial similarity between two items is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same.” *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (quotation marks omitted).

However, “where [a court] compare[s] products that contain both protectible and unprotectible elements, [its] inspection must be more discerning,” *Knitwaves, Inc.*, 71 F.3d at 1002 (quotation marks omitted), because “copying is illegal because a substantial similarity exists between the defendant’s work and *the protectible elements of plaintiff’s*.” *Hamil Am. Inc.*, 193 F.3d at 99 (emphasis added). Therefore, where the allegedly infringed work consists of both protectible and unprotectible elements, the court “must attempt to extract the unprotectible elements from [its] consideration and ask whether the *protectible elements, standing alone*, are substantially similar.” *Knitwaves, Inc.*, 71 F.3d

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at 1002 (emphasis in original). That is, “[t]he court, confronted with an allegedly infringing work, must analyze the two works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking.” *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134-35 (2d Cir. 2003).

Nevertheless, the nature of the creative process is such that even this discerning approach can prove clumsy. “[I]n Hollywood, as in the life of men generally, there is only rarely anything new under the sun.” *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (quoting *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985)). Since “all creative works draw on the common wellspring that is the public domain,” *Tufenkian Imp./Exp. Ventures, Inc.*, 338 F.3d at 132, copyright protection does not extend only to new forms of expression but also, and more commonly, to assembling old forms in original ways. *Cf. Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987) (“Though

a cliché or an ‘ordinary’ word-combination by itself will frequently fail to demonstrate even the minimum level of creativity necessary for copyright protection, such protection is available for the ‘association, presentation, and combination of the ideas and thought which go to make up the [author’s] literary composition.’”) (internal citation omitted) (quoting *Nutt v. Nat’l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929)).

Considering only those elements that alone are protectible “would result in almost nothing being copyrightable because original works broken down into their composite parts would

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usually be little more than basic unprotectible elements like letters, colors and symbols.” *Boisson*, 273 F.3d at 272.

Accordingly, the Second Circuit has recognized that “the defendant may infringe on the plaintiff’s work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work . . . are considered in relation to one another.” *Tufenkian Imp./Exp. Ventures, Inc.*, 338 F.3d at 134. The Court of Appeals therefore “ha[s] disavowed any notion that ‘[courts] are required to dissect [the works] into their separate components, and compare only those elements which are in themselves copyrightable.’” *Gaito*, 602 F.3d at 66 (quoting *Knitwaves, Inc.*, 71 F.3d at 1002). Instead, courts must be “principally guided ‘by comparing the contested [work’s] total concept and overall feel’ with that of the allegedly infringed work, as instructed by [their] good eyes and common sense.” *Gaito*, 602 F.2d at 66 (quoting *Tufenkian Imp./Exp. Ventures, Inc.*, 338 F.2d at 133)). This “total-concept-and-feel locution functions as a reminder that, while the infringement analysis must *begin* by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original,

infringement analysis is not *simply* a matter of ascertaining similarity between components viewed in isolation.” *Tufeknian Imp./Exp. Ventures, Inc.*, 338 F.2d at 134 (emphasis in original). Rather, “in the end, [the] inquiry necessarily focuses on whether the alleged infringer has misappropriated ‘the original way in which the author has ‘selected, coordinated, and arranged the elements of his or her work.’” *Gaito*, 602 F.3d at 66 (quoting *Knitwaves Inc.*, 71 F.3d at 1004) (other quotation marks omitted).

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Accordingly, the infringement analysis proceeds as follows. First, the Court will determine what elements of the Film are protectible. Second, the Court will determine whether there is a substantial similarity between those elements and the Musical. Third, since both the Second Circuit and Canal+ have emphasized the importance of one element—the total concept and feel of the works—the Court will treat total concept and feel separately.

### **1. What Elements of the Film are Protectible**

Courts assessing whether two works are similar “examine the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting . . . .” *Williams*, 84 F.3d at 588. The first question is whether any of these elements of the Film are protectible. Answering that question in this case requires a brief discussion of the law governing derivative works because Canal+ alleges that the Novel served as “source material for the Film.” (Compl. ¶ 15.)<sup>2</sup>

“Originality is the sine qua non of copyright.” *Tufeknian Imp./Exp. Ventures, Inc.*, 338 F.3d at 131. “If a work is not original, then it is unprotectible.” *Boisson*, 273 F.3d at 268. “Originality does not mean that the work for which copyright protection is sought must be

either novel or unique, it simply means a work independently created by its author, one not copied from pre-existing works, and a work that comes from the author.”

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<sup>2</sup> While the complaint does not use the term “derivative work,” Canal+ does not appear to contest that the Film is a derivative work of the Novel. Indeed, Canal+ argues that “the creators of the Film transformed a dark, anti-Semitic novel into a comedy”; that “defendants turned *Israel Rank* into a comedy . . . *by the same artistic means* [using one actor to play all the victims] by which the creators of the classic Film did so”; and that the filmmakers “transformed the novel into an entirely different artwork by creating the central expressive device,” and cites to the complaint in doing so. (Pl.’s Opp’n at 5, 12 (emphasis added).) Accordingly, the Court will treat the Film as a derivative work.

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exercise of the creative powers of the author’s mind, in other words, the fruits of the author’s intellectual labor.” *Id.* (internal citation and quotation marks omitted).

The originality requirement applies in equal measure to derivative works. Section 101 of the Copyright Act defines a derivative work as: a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, *motion picture version*, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.

17 U.S.C. § 101 (emphasis added). “The subject matter of copyright . . . includes compilations and derivative works . . . .” 17 U.S.C. § 103(a). However, “[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not

imply any exclusive right in the preexisting material.” 17 U.S.C. § 103(b). Thus “copyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works.” *Silverman v. CBS Inc.*, 870 F.2d 40, 49 (2d Cir. 1989); *see also Psihoyos v. Nat’l Geographic Soc’y*, 409 F. Supp. 2d 268, 278 (S.D.N.Y. 2005) (“Only the original elements of a derivative work, *i.e.* the non-trivial additional matter transforming a prior work, are protected by copyright.”); *Earth Flag Ltd. v. Alamo Flag Co.*, 153 F. Supp. 2d 349, 353 (S.D.N.Y. 2001) (“Although derivative works are protectible, copyright protection extends only to the non-trivial, original contributions of the derivative work’s author.”).

While this is “a low threshold,” “[t]he law requires more than a modicum of originality” and the Copyright Act “has been interpreted to require a distinguishable variation that is more than merely trivial.” *Waldman Pub. Corp. v. Landoll, Inc.*, 43

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F.3d 775, 782 (2d Cir. 1994). “In the case of a derivative work based on an underlying work that is in the public domain, only the material added to the underlying work is protected by copyright.” *Id.* Accordingly, to the extent that any of the similarities between the Film and the Musical are derived from the public domain Novel, those similarities are not protectible.

#### **a. Characters**

Most of the characters in the Film appear in the Novel: a protagonist descended from a non-noble father and a noble mother whose marriage causes the protagonist’s disinheritance; Sibella, the protagonist’s coquettish childhood friend whose snub catalyzes the criminal plan; a second principal female character related to Henry whom the protagonist

ultimately marries; and six similar victims: the head of the family, the manager of the family's private banking business, the manager's son (and his mistress), the character named Henry, a heavy-drinking reverend, and a military officer. At most, then, small details of these characters are protectible. For example, unlike the protagonist of the Novel whose father is Jewish, the protagonist of the Film is the son of an Italian father. Similarly, in the Novel (as in the Musical) the second principal female character related to Henry whom the protagonist courts and to whom he becomes engaged is Edith, Henry's sister. In the Film, however, the same character is Phoebe, Henry's widow. These differences could be protectible, but the characters in general are not.

## **b. Plot**

As set forth above, both the Film and the Musical present the same basic story. The protagonist learns of his disinheritance and, spurred in part by rejection by Sibella and the noble family's banking house, conceives and carries out a plan to murder the

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eight heirs between him and the noble title. With the family in the dark as to the protagonist's plan, the protagonist's move up the family hierarchy leads to an invitation to join the banking house and with it ever more recognition, prestige, and wealth. Sibella takes notice of the protagonist's advancement and, bored by Lionel whom she agreed to marry when his prospects seemed brighter than the protagonist's, begins an affair with the protagonist. At the same time, the protagonist courts and becomes engaged to a mourning relative of Henry. After the protagonist has dispatched all but the head of the noble family, the head of the noble family dies, and the protagonist inherits the title. He is then arrested for and falsely accused of murder. A woman in love with him, however, hatches a plan to exonerate the



protagonist and he is freed only to discover that he has left his memoirs, and thus a confession, in his cell.

This basic story is not protectible, however, because it is a story almost entirely derived from the Novel. The only notable differences between the just described common plot of the Musical and the Film and the plot of the Novel are that the protagonist in the Novel actually murders the head of the family, is rightly accused and convicted of that crime, and is exonerated not by Sibella but by a governess at the ancestral home who falsely confesses to the murder. The Film adapts that ending such that the head of the family dies naturally, and Sibella falsely accuses the protagonist of murdering Lionel but exonerates him after blackmailing him into agreeing to murder Edith. Since that adaption is original, it may be protectible. But the basic skeleton of the story is not.

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### **c. Theme**

Plaintiffs allege that Defendants “have simply taken the same musical which they previously called *Kind Hearts and Coronets*, changed the title and the names of certain characters, made other immaterial changes, and have now announced a pre-Broadway commercial production of that musical.” (Compl. ¶ 16.) Defendants, however, argue that “the concept of creating a humorous derivative work based on *Israel Rank* is a nonprotectible idea, which cannot give rise to a claim of copyright infringement.” (Defs.’ Br. at 16.) That argument implicates what the Supreme Court has called the “idea/expression dichotomy” which “assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991). Pursuant to this dichotomy, “copyright does not

protect ideas; it protects only the author's particularized expression of the idea." *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 135-36 (2d Cir. 2004); *see also Boisson*, 273 F.3d at 268 ("[C]opyright protection extends only to a particular expression of an idea, and not to the idea itself."). Thus "the similarity between two works must concern the expression of ideas, not the ideas themselves." *Gaito*, 602 F.3d at 67.

That statement of the law, however, is "a distinction easier to state than to apply." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986). Indeed, "no single 'principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression . . . .'" *Attia v. Soc'y of New York Hosp.*, 201 F.3d 50, 54 (2d Cir. 1999) (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.)). *Cf.* 1 Nimmer on Copyright § 13.03[A][1] (2003)

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(dismissing the "idea/expression dichotomy" as "a reformulation not a solution of the problem"). "Decisions must therefore inevitably be *ad hoc*." *Peter Pan Fabrics, Inc.*, 274 F.2d at 489.

Nevertheless, this case is far less difficult than some. The notion of a comic adaption of a novel about murder is an idea, or an interpretation, that can be expressed in many different ways. Indeed, Canal+ effectively concedes that "[w]hat is at issue is not that defendants turned *Israel Rank* into a comedy . . . ." (Pl.'s Opp'n at 5.) Accordingly, a comedic adaption of the Novel is not protectible.

#### **d. Setting**

The Film appears to be set in Edwardian England. There are several clues to that setting: antiquated versions of motorcars and cameras, the general's tale of his exploits in the Boer War, and the portrayal of the female suffragist. This setting is not protectible not only because it is historical but because it is also the setting of the Novel. *See, e.g., Bevan v. Columbia Broad. Sys., Inc.*, 329 F. Supp. 601, 606-7 (S.D.N.Y. 1971) ("What resemblance remains between the two works arises from the nature of subject matter, a POW camp within Hitler's Germany . . . . Similarity of this kind fails to meet the appropriate legal tests either of substantiality or wrongful appropriation.").

#### **e. "Composite Victim"**

Canal+ stakes much of its infringement argument on the fact that initial previews of the Musical suggest that one actor will play all of the victims just as Sir Alec Guinness did in the Film.<sup>3</sup> Based on that fact, Canal+ argues that the defendants "have blatantly

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<sup>3</sup> Canal+ has attached to its complaint an article from the entertainment periodical *Variety* reporting that a Tony Award-winning actor was slated to play all of the victims in a run of the Musical. (See Compl. Ex. A.) Defendants argue that this element is not part of

appropriated the Film's central means of expression, and used it as the centerpiece of their musical. . . ." (Pl.'s Opp'n at 11.) While this argument warrants analysis in considering the total concept and feel of the Film, *see* Part A.3 *infra*, it lacks merit to the extent that Canal+ seeks protection for the Film's use of a standard convention. The dramatic device of using

one actor to play multiple roles in the same production is not protectible in itself because there is nothing original about that device. Indeed, it is no more original than using “a character who talks directly to the audience,” “celebrities appearing as themselves,” or “men disguising themselves as women” which courts in this Circuit have held not protectible in two cases cited by Defendants. *See A Slice of Pie Prods., LLC v. Wayans Bros. Ent’tmt*, 487 F. Supp. 2d 41, 48 (D. Conn. 2007) (characters in disguise); *Willis v. Home Box Office*, No. 00-CV-2500, 2001 WL 1352916, at \*5 (S.D.N.Y. Nov. 2, 2001) (“*Willis I*”), *aff’d* 57 Fed.Appx. 902 (2d Cir. 2003) (“*Willis II*”) (characters speaking directly to the audience and celebrities appearing as themselves). Nor is it any more original than using a master of ceremonies, celebrity guests, capital letters in title sequences, or black and white costumes, all of which cannot be protected. *See Mallery v. NBC Universal, Inc.*, No. 07-CV-2250, 2007 WL 4258196, at \*7 (S.D.N.Y. December 3, 2007) (white block capital letters); *Barris/Fraser Enter. v. Goodson-Todman Enter., Ltd.*, 5 U.S.P.Q.2d 1887, 1889 (S.D.N.Y. 1987) (Weinfeld, J.) (“Nor is protection extended to a system of asking questions, the concept of a master of ceremonies and celebrity guests, or the true stories told on the show. It is only in original expression that defendant can claim copyright protection.”); *O’Brien v. Chappel & Co.*, the script of the Musical (*see* Defs.’ Reply at 10), but the Court assumes for purposes of this motion that the alleged infringing work also involves a composite victim. To the extent that productions of Defendants’ musical do not use this device, Plaintiffs’ claim for copyright infringement would be more easily dismissed.

159 F. Supp. 58, 59 (S.D.N.Y. 1958) (“[P]laintiff cannot get copyright . . . to the idea of having the actors and actresses in a stage show appear in a scene dressed in black and white costume.”).

## **2. Similarity**

The next question involves application of the “more discerning observer” test: whether “a substantial similarity exists between the defendant’s work and *the protectible elements of plaintiff’s*.” *Hamil Am. Inc.*, 193 F.3d at 99 (emphasis added). In this case, the question is whether there is a substantial similarity between what the Court has just determined are the protectible elements of the Film “standing alone,” *Knitwaves, Inc.*, 71 F.3d at 1002, and the Musical? “[T]he determination of the extent of similarity that will constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.” *Gaito*, 602 F.3d at 63 (emphasis in original) (quoting 1 Nimmer on Copyright § 13.03[A]). However, the question is somewhat easier in this case because the Film, as a derivative work, contains limited original elements, and most of those original elements are not similar to elements of the Musical.

### **a. Characters**

As discussed above, the Film’s characters are generally not protectible because they are derived from the public domain Novel. Moreover, even those minor character details that are protectible are not portrayed in the Musical. For example, in the Musical, as in the Novel, the second principal female character is Phoebe, Henry’s sister, not, as in

the Film, Henry's widow Edith.<sup>4</sup> In addition, each work portrays two victims not portrayed in the other: a missionary and an actress in the Musical; a female suffragist and an admiral in the Film. And the Musical also portrays a character named Miss Shingle who first alerts the protagonist to his noble heritage and commits the murder of which the protagonist is later accused but who appears nowhere in the Film. Accordingly, there is no substantial similarity between the protectible aspects of the characters in the Film and the characters in the Musical.

#### **b. Plot**

As also discussed above, the Film's story is generally not protectible because it is derived from the public domain Novel. And while the ending of the Film is an original, and therefore protectible, adaption of the Novel, it is not the ending of the Musical. The Musical ends as follows: the head of the family does not die naturally but is poisoned by Miss Shingle; the authorities, not Sibella, falsely accuse the protagonist of that murder, not of Lionel's; Phoebe, not Sibella, visits the protagonist in prison and does not blackmail him; and the two women together, rather than Sibella alone, exonerate the protagonist by making false confessions and agree to share his affections. And unlike in the Film, the protagonist recovers his memoirs.

The plot of the Film and the plot of the Musical also differ in numerous other ways. In the Film, the protagonist learns from his mother at a very young age that he has

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<sup>4</sup> Defendants attempt to argue that these two characters are different in that Phoebe is a feminist who initially refuses to marry the protagonist but later propositions him herself whereas Edith is a "charming but reserved prohibitionist." (Defs.' Br. at 24.) This slices

things too thin. Both women seem quite purposefully characterized as intelligent and independent-minded, critical of traditional hierarchies, and strong in times of grief. Indeed, it is these traits, in contrast to Sibella's single-minded coquetry, that attract the protagonist in both works.

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been disinherited. He grows up with resentment for the noble family that only grows when he is rejected from the family banking house. The rejection occurs while the protagonist's mother is still alive and the protagonist's mother stokes the protagonist's resentment. The Musical, however, does not portray the protagonist's childhood. Rather, the protagonist learns not from his mother but from Miss Shingle, after his mother's death, that he has been disinherited. Only then does the protagonist write to the family banking house.

The protagonist in the Musical also commences his plot and murders his victim in ways different from the means used by the protagonist of the Film. In the Musical, the protagonist does not truly hatch his plan until the time that he "murders" his first victim, the reverend, whom he decides not to prevent from falling from a turret. The protagonist then throws the banking family son and his mistress from a Ferris wheel; uses lavender to attract a swarm of bees to sting Henry to death; has Lady Hyacinth dispatched to a district of cannibals; drops a barbell on the fitness fanatic Lord Bartholomew, and loads Lady Salome's gun with real bullets for the climactic suicide scene in Henrik Ibsen's play *Hedda Gabbler*. The head of the banking house then suffers a heart attack. Finally, the protagonist attempts to poison the head of the family on a visit to the ancestral estate but fails to do so.

In the Film, however, the protagonist conceives his plan after his mother's death and murders his first victim, the banking house son, by sending his and his mistress's canoe over

a waterfall. Like the Ferris wheel incident in the Musical, this also occurs at a resort outside of London. The protagonist then murders Henry by causing an explosion in his darkroom, poisons the reverend, sends the general a bomb in a tin of caviar, and

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shoots down the suffragist's protest balloon. The admiral is drowned after he refuses to leave his sinking ship that has been wrecked in a collision at sea in which the protagonist plays no part. Much like the analogous character in the Musical, the head of the banking house then dies of a stroke. Also as in the Musical, the protagonist is then invited to the ancestral home where he attempts to murder the head of the family. In the Film, however, the protagonist succeeds by shooting the man with a shotgun while making the incident look accidental.

The protagonist in each work is also falsely accused of a different crime. In the Musical, the protagonist is accused of murdering the head of the family. In the Film, however, the protagonist is accused of murdering Lionel, who has committed suicide out of financial despair after an unsuccessful entreaty to the protagonist for assistance. This difference results in two different endings. In the Film, Sibella, who has falsely accused the protagonist, visits the protagonist in prison after he has been convicted and sentenced to death. Sibella offers to reveal Lionel's suicide note if the protagonist will agree to murder Edith, his fiancée. The protagonist agrees to the plan and Sibella produces the suicide note in the nick of time. The protagonist is freed but discovers after being solicited to sign a contract for his memoirs that he has left them in his cell. He now must contend with two dilemmas: a confession lying in his cell and whether to ride home with Sibella or Edith, both of whom are waiting in their carriages outside the prison.



In the Musical, it is Phoebe, not Sibella who visits the protagonist in prison on the eve of the verdict, not his execution. Sibella and Phoebe each accuse each other of the murder (which has actually been committed by Miss Shingle), leading the authorities to doubt whether the protagonist actually committed the murder. The protagonist is freed

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and likewise leaves without his memoirs but evades both dilemmas the protagonist faces in the Film: his lovers seem content to share his affections and a guard rushes out to return the memoirs. The Musical ends with the protagonist's distant cousin plotting his own scheme to murder his way to what is now the protagonist's title.

In sum, most of the plot of the Musical that is similar to the plot of the Film is not original to the Film and nearly all of the plot that is original to the Film is not similar to the plot of the Musical. Accordingly, there is no substantial similarity between the protectible aspects of the plot of the Film and the plot of the Musical.

### **3. Total Concept and Feel**

However, the above comparison by dissection is not the end of the matter. The Court must also consider whether there is a substantial similarity between the total concept and feel of the two works. Of course, on a broad level, both the Film and the Musical are comedies. But as discussed above, that abstracted similarity cannot give rise to infringement and, implicitly conceding as much, Canal+ alleges that “having all of the murder victims played by the same leading comic actor is central to the artistic expression of the Film” and “affects, and is inextricably intertwined with, not just the tone but all of the dramatic situations in the Film, including its ‘total concept and feel.’” (Compl. ¶ 20.)

Drawing on that allegation, Canal+ contends that the composite victim is “bound together in an inseparable unity with all of the [F]ilm’s other elements” (Pl’s Opp’n at 21) and “is interwoven throughout the elaborate plot, moving the audience to laughter each time another foppish victim falls.” (*Id.* at 18.) As a result, Canal+ contends that “the composite victim is responsible for creating the total concept and feel of the Film.”

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(*Id.* at 21.) That is, the composite victim is “the heart and soul” of the Film such that any other work portraying a composite victim would be substantially similar to the Film in total concept and feel. (*Id.* at 10.) Indeed, Canal+ argues that if this were the “only similarity between the two works, defendants’ appropriation of it would still be actionable.” (*Id.* at 21.)

The argument that the Musical uses the same device to tell the same story with the same feel resonates with some statements of the law in this Circuit, discussed above, to the effect that “the defendant may infringe on the plaintiff’s work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work. . . are considered in relation to one another.” *Tufenkian Imp./Exp. Ventures, Inc.*, 338 F.3d at 134.

On the other hand, “if we use identical phrases from one context to resolve issues in another, we risk failing to notice that the relevant concepts are and ought to be somewhat different.” *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 459 (S.D.N.Y. 2005) (Kaplan, J.) (quoting Hon. Jon. O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 Cardozo Arts & Ent. L.J. 691, 694 (1999)). *Cf. Franklin Mint Corp. v. Nat’l Wildlife Art Exchange, Inc.*, 575 F.2d 62, 65 (3d Cir. 1978) (“Troublesome, too, is the fact that the same general principles are applied in

claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings.”). On its face, disavowing the notion that courts should “compare only those elements which are in themselves copyrightable,” *Gaito*, 602 F.3d at 66, seems hard to square with the “‘more discerning observer’ test, which requires substantial similarity between those elements, and only those elements,

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that provide copyrightability to the allegedly infringed work.” *Lapine v. Seinfeld*, 375 Fed. Appx. 81, 83 (2d Cir. 2010). Yet “[t]he tension between these two propositions perhaps results from their formulation in the context of literary works and their subsequent application to graphic and three-dimensional works.” *Warner Bros. Inc.*, 720 F.2d at 241 (Newman, J.).

The cases in which the Second Circuit has most strongly emphasized the need to examine works holistically have involved the visual arts. *See Gaito*, 602 F.3d 59 (architectural plans); *Tufenkian Imp./Exp. Ventures, Inc.*, 338 F.3d 127 (rug design); *Yurman Design, Inc.*, 262 F.3d 101 (jewelry design); *Boisson*, 273 F.3d 262 (quilt design), *Knitwaves*, 71 F.3d 996 (sweater designs), *Peter Pan Fabrics*, 274 F.2d 487 (cloth design). With regard to such works, “which are addressed to the aesthetic sensibilities of the observer, the [idea/expression] test is, if possible, even more intangible.” *Id.* at 489. Indeed, “one cannot divide a visual work into neat layers of abstraction in precisely the same manner one could with a text.” *Sapon v. DC Comics*, No. 00-CV-8992, 2002 WL 485730, at \*3 (S.D.N.Y. Mar. 29, 2002) (quoting Newman, 17 Cardozo Arts & Ent. L.J. at 697-98). “A story has a linear dimension: it begins, continues, and ends” but “[a] graphic or three-dimensional work is created to be perceived as an entirety. Significant dissimilarities between two works of this

sort inevitably lessen the similarity that would otherwise exist between the total perceptions of the two works.” *Warner Bros, Inc.*, 720 F.2d at 241. Accordingly, Judge Kaplan has concluded that “little is gained by attempting to distinguish an unprotectible ‘idea’ from its protectible ‘expression’ in a photograph or other work of visual art.” *Mannion*, 377 F. Supp. 2d at 459. While the elusiveness of that distinction has not caused the Second

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Circuit to jettison the traditional approach, the distinction does explain why the Second Circuit has found no inconsistency between the need to focus judicial eyes on the interplay of visual elements and the more discerning observer test. Accordingly, if the total concept and feel inquiry requires keeping an eye on the works as a whole, the inquiry must be made with another eye on the medium of the works at issue.

A film is not a work that is easily divided into “neat layers of abstraction in precisely the same manner one could with a text.” *Sapon*, 2002 WL 485730, at \*3. Indeed, some of the magic of the movies may indeed be the way that a film combines a wide variety of narrative, visual, and aural elements—lighting, camera angles, dialogue, sound, music, scenery, acting, and even special effects. And it is the combination of these disparate elements in a particular way that turns the otherwise innocuous into the iconic. Neither the idea of a boy befriendng an alien, nor a camera shot of an object shadowed by the moon, nor a flying bike, nor the individual notes of the score for *E.T.* are protectible, but that hardly means that the scene of Eliot flying with his extraterrestrial friend is not original. The scene would not be *that* scene if the elements were not combined just so. And yet, at the same time, unlike many visual works, films are also narratives whose scenes and characters can be disaggregated and compared to scenes and characters in other works. It is one thing to say that each element of a

work affects the other and contributes to the whole, but it is quite another to say that the elements of a work are subsumed into the whole. In watching the *E.T.* scene, we may lose ourselves in the cinematic effect, but we also able to isolate the character development and plot.

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This unique quality of the film medium—part narrative, part visual—gives Canal+’s emphasis on the so-called composite victim some surface appeal. Yet the same ineffable quality also makes the singularity of Canal+’s emphasis somewhat misplaced. A film is a film because all the elements work together, but Canal+ asks the Court to examine just the device that is similar. Canal+ appears to justify that myopia by arguing that the “composite portrait is the most important single ‘element’ in defendants’ musical as in the Film” and “what most people remember about the Film.” (Pl’s Opp’n at 10, 22). Perhaps so, but the question here is not whether most people would remember what all critics agree is a *tour de force* by Sir Alec Guinness, but whether a discerning observer having viewed both works, “unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same.” *Yurman Design, Inc.*, 262 F.3d at 111 (quotation marks omitted). Where Canal+ contends that the composite victim is “bound together in an inseparable unity with all of the [F]ilm’s other elements,” the total concept and feel inquiry cannot be conducted with “good eyes and common sense” without considering all the elements that make the film the Film. *Gaito*, 602 F.2d at 66.

The most important element, of course, is the story itself. Indeed, absent the unprotectible story of a disinherited aristocrat murdering all of the heirs between himself and a dukedom, the creators of the Film who decided to have Guinness play multiple roles would

have had nothing to transform. Yet an observer who overlooked the story to focus on the multiple role convention would scantily be believed to have seen the work at all rather than merely the current DVD cover showing Sir Alec Guinness playing all eight victims. Hence the story is not merely a canvas on which the device of using one

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character to play multiple roles paints with comic strokes. Rather, the story itself is a large part of the work's total concept and feel.

It is also notable that an observer following the story of each work could not fail to notice that the works—to the extent that they differ from the Novel—have different endings that reflect the works' different comedic registers. In the Musical, the protagonist is accused of murdering the head of the family, a murder which, unbeknownst to the audience, has actually been committed by Miss Shingle. In the Film, the protagonist is charged with murdering Lionel whom, after the somber and pitiful scene in which he has pled for the protagonist's help and then attacked him, it seems clear has committed suicide. In the Musical, Sibella and Phoebe jointly hatch a plan to free the protagonist and their exit—each with one arm on the protagonist's, shaking hands behind his back with a knowing nod—suggests they are content to share his affections, a somewhat salacious twist on the happily ever after ending. In the Film, however, the plan that saves the protagonist is an extortion of one life for another. In the Musical, in an entirely absurd *deus ex machina*, Miss Shingle confesses to the murder. And the protagonist's distant cousin adds levity to the prospect of another series of murders. The Film, however, fades to black with two foreboding cliffhangers: will the protagonist be convicted on the basis of his memoirs that he has left in his cell, and will he murder Edith to repay Sibella for saving the very life she endangered

with false accusations? In short, the end of the Musical is absurd and light-heartedly scandalous; the end of the Film is cruel, dramatic, and hardly comedic at all.

The same is true of the works writ large. Indeed, there is merit to Defendants' characterization of the Film as "a subtle, dark Wildean comedy, with some truly sinister

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scenes (such as the point-blank execution of the [head of the family]" to which they contrast the Musical as "a far lighter, broad comedy, filled with several bawdy scenes and riotous musical numbers." (Defs.' Br. at 22.) Many elements of the Film—the cliff-hanger ending, scenes of violence, Lionel's drunken plea, Sibella's extortion—are dramatic rather than comedic. To the extent that the Film is a comedy, it achieves that effect largely through dry wit, deadpan timing, deliberate understatement, and overplayed British class tropes: the dandified upward male climber of a protagonist; the curmudgeonly and reactionary *paterfamilias*; the young aristocrat more interested in the arts than in his wife; the stodgy, nostalgic general; the liquored up clergyman; the philandering profligate; the admiral who puts duty over sanity; and the rabbleroising suffragette. In short, the Film is at most tongue-in-cheek.

The Musical, however, sticks its tongue out. It is a bawdy, slapstick comedy. Where the Film is subtle, the Musical is campy. The songs use barely disguised sexual innuendo, parody modern tropes such as physical fitness fanatics, and ascribe to the aristocracy views of the poor and of Africans that are so exaggerated that they would be offensive if they were not so obviously mocking. And however improbable they may be, the murders in the Film involve largely realistic means—bombs, poison, firearms—but the murders in the Musical are unbelievable to the point of farce: attracting a swarm of bees, sending a Ferris wheel out

of control, cannibalism, and sabotage in the weight room are meant to be funny because they are so absurd.

As can be seen from the foregoing, the total concept and feel of the Film is a dark comedy/drama about a disinherited heir who murders his relatives to obtain the baronetcy, while that of the Musical is a bawdy, over-the-top send-up of the same

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(unprotectible) plot. That both works employ the convention of using a single actor to play all the victims may add to the amusement, but it is hardly the “heart and soul” of each work. At their core, each rendition presents a radically different aesthetic placing one outside the copyright protection of the other.

The Second Circuit has explicitly cautioned that the “‘total concept and feel’ standard may ‘invite an abdication of analysis,’ because ‘feel’ can seem a ‘wholly amorphous referent . . . .’” *Tufenkian Imp./Exp. Ventures, Inc.*, 338 F.3d at 134 (quoting 4 Nimmer on Copyright § 13.03[A][1][c] (2003)). In order to avoid the possibility that “a copyright doctrine whose aspiration is to protect a work’s ‘concept’ could end up erroneously protecting ‘ideas,’” or something else unprotectible, the Court of Appeals “has taken care to identify precisely the particular aesthetic decisions—original to the plaintiff and copied by the defendant—that might be thought to make the designs similar *in the aggregate*.” *Id.* (emphasis added). Canal+ describes that precise aesthetic decision as using one actor to play multiple roles in the serial murder story described in the Novel. But as described above, an actor playing all the roles of the victims does not make the two works “similar in the aggregate” because they are different kinds of comedies, each with a different total concept and feel.



In this regard, *Rodriguez v. Heidi Klum Company, LLC*, No. 05-CV-10218, 2008 WL 4449416 (S.D.N.Y. Sept. 30, 2008) is instructive. *Rodriguez* involved two reality television shows depicting competitions between budding fashion designers: *American Runway*, the allegedly infringed work, and *Project Runway*, the allegedly infringing work. Both works used unprotectible elements such as “a panel of judges composed of fashion industry experts, a design workroom with sewing machines, a specific number of

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contestants, professional models, hairstylists, make-up artists, weekly episodes and the setting of New York . . . .” *Id.* at \* 5. By combining these elements common to other reality television shows, both works transformed the unprotectible “idea of a reality television show where people compete for a prize”—a basic staple of modern television programming—into a fashion competition show. *Id.* at \*4. Yet each work also used elements that the other did not to create fashion competitions that felt very different.

In *American Runway*, “aspiring fashion designers compete[d] to create the best moderately priced clothing line for a ‘Real American Man or Woman’; viewers’ votes counted in determining which contestants advanced to the next round; and “[t]he majority of episodes took place in front of a live studio audience, with whom an attractive and comedic semi-celebrity host interacts throughout the episodes.” *Id.* at \*5. In *Project Runway*, however, “the contestants compete[d] in unrelated elimination challenges each week without regard for whether or not their clothing would ever be marketable to consumers”; “[t]he American public has no say in elimination decisions, which are made exclusively by a panel of judges”; and “aside from the finale in Bryant Park, *Project Runway* does not feature a live audience or a comedic host who interacts with the public.” *Id.* As a result, the court found that the

concept, feel and theme of *Project Runway* are plainly distinguishable from those of *American Runway*. *Project Runway* does not ostensibly bend to its audience; the viewer is given a glimpse into the world of high fashion and is allowed to watch the fashion elite decide which of the contestants deserves admission into their exclusive enclave. *American Runway* is much more populist and inclusive; the viewer has a powerful voice in the outcome of the show, and the program caters to engaging the fashion sensibilities of its “real American” audience.

*Id.* at \*6. *Cf. Cabell v. Sony Pictures Entm’t, Inc.*, 714 F. Supp. 2d 452, 461 (S.D.N.Y. 2010) (“Moreover, the concept and feel of the Blonde Works are distinct from the Zohan

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film. The Jayms Blonde stories are parodies of the James Bond stories, and much of the humor is double entendre and innuendo. In contrast, *You Don’t Mess With the Zohan* derives much of its humor by exaggerating Arab and Israeli stereotypes. For example, Israelis’ purported affinity for humus is the subject of many sight gags throughout the film.”). It is just so here: both works use the same device to transform an unprotectible idea, but both works also combine the device with other elements to create works that are comedic in different ways and for different reasons.

In sum, copyright infringement requires substantial similarity between protectible aspects of the allegedly infringing and infringed works. Both works use one actor to play multiple roles, but under the discerning observer test, that device is not protectible. And however protectible a combination of elements might be under the total concept and feel test, the works do not have a similar feel. Canal+ would have the Court apply a kind of intermediate test that examines not the elements alone or the works in their entirety but only

one aspect of those works: how the decision to portray characters in a story interacts with that story. At bottom, however, that inquiry merely asks how parts have been acted. As applied here, that amounts to an argument that Sir Alec Guinness's *tour de force* is protectible. But it is no more protectible than Charles Laughton's Henry VIII or Sir Laurence Olivier's Hamlet. *See Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 909 (S.D. Cal. 1950). The performance may never be equaled, but that does not mean nobody has the right to try.

At first blush, the foregoing may suggest that a famous film has very little copyright protection, a result that may initially appear odd in a case where (a) Defendants apparently believed that the Film's copyright was worth giving Canal+ an exclusive

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option on the Musical; and (b) the two works appear similar in many respects. As to the first issue, the Court is not in a position to know whether Defendants' actions were the result of their genuine belief that the Film had more protection than they now contend or a belt-and-suspenders approach and the answer to that question cannot change the result.

As to the second issue, the discerning observer test instructs that similarities attributable to unprotectible elements may as well not be similarities at all. Canal+ owns the copyright to a comedic adaptation of a novel in the public domain, that is, an interpretation of an unprotectible story that is free for the taking. Thus almost all of the similarities between the two works are unprotectible and the two works might as well be totally different. It would be a strange result if the total concept and feel inquiry changed that conclusion merely because the Film mostly consists of unprotectible elements. And it would be an incorrect result in a case where Defendants combined one common but unprotectible element—an actor playing multiple roles—with other original elements to create a different comedic

interpretation of a novel that Canal+ does not own. However famous the Film is, its creators' original contribution was limited to the way in which they employed the varied elements of cinema—themselves unprotectible—to put their interpretation of that story on the screen. Accordingly, the scope of their copyright—and therefore their right to prevent others from unauthorized copying—extends only to works approximating a reproduction of the essential elements of the Film, that is, a work with a substantially similar total concept and feel. But no reasonable jury would find that that description fits Defendants' Musical. Accordingly, the copyright claim must be dismissed.

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## **B. Breach of Contract Claim**

Canal+ also alleges that Defendants' adaption of the Musical would breach the Agreement. Defendants argue that this claim is preempted by the Copyright Act.

“When Congress amended the Copyright Act in 1976, it provided for the preemption of state law claims that are interrelated with copyright claims in certain ways.” *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir. 1997). Pursuant to 17 U.S.C. § 301, “[t]he Copyright Act exclusively governs a claim when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act . . . and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law . . . .” *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). The first requirement, the “subject matter requirement,” “is satisfied if the claim applies to a work of authorship fixed in a tangible medium of expression and falling within the ambit of one of the categories of copyrightable works,” including “motion pictures” and works “based on preexisting works.”

*Id.* That requirement is satisfied here: Canal+ alleges that the Musical is based on the Film, a preexisting work.

The second requirement, the “general scope requirement,” presents a considerably more difficult question. This requirement “is satisfied only when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law.” *Id.* (citing *Computer Assocs. Int’l*, 982 F.2d at 716). That is, (1) “the state law claim must involve acts of reproduction, adaptation, performance, distribution or display”; and (2) “the state law claim must not include any extra elements that make it qualitatively different from a copyright infringement claim.”

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*Briarpatch Ltd.*, 373 F.3d at 305. As to the “extra element” requirement, courts examine “what [the] plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced.” *Computer Assocs. Int’l*, 982 F.2d at 716. Yet the Second Circuit has held that courts must “take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim.” *Briarpatch Ltd.*, 373 F.3d at 306.

“The Court of Appeals has not addressed whether the promise inherent in every contract is sufficient to establish an ‘extra element.’” *BroadVision Inc. v. Gen. Elec. Co.*, No. 08-CV-1489, 2008 WL 4684114, at \*4 (S.D.N.Y. Oct. 15, 2008). And “[c]ourts in this district have continued to disagree how to analyze preemption of breach of contract claims.”

*Banxcorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 614 (S.D.N.Y. 2010).<sup>5</sup> Some courts, following *Architectronics, Inc. v. Control Systems, Inc.*, 935 F.

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Other Courts of Appeals are also divided on this issue. Some circuits have found contract claims preempted, particularly where the contractual rights at issue were identical to or derivative of rights conferred by the Copyright Act. *See, e.g., Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153, 1158 (9th Cir. 2010) (“[T]he plaintiffs’ expectation of profits and credit was premised on the fact that they would retain control over their work, whether in partnership with the defendants or not. The plaintiffs’ right to receive a share of the profits and credit is thus merely derivative of the rights fundamentally at issue: the plaintiffs’ exclusive rights to use and to authorize use of their work.”); *Ritchie v. Williams*, 395 F.3d 283, 287-88 (6th Cir. 2005) (“The claims are that Kid Rock licensed the songs he had written to others in violation of the copyrights and the performance and distribution rights of the Williams group. All of these claims are ‘equivalent’ to infringement claims. There is no meaningful ‘extra element,’ as some of the cases have put it, that removes the reformulated claims from the policy of national uniformity established by the preemption provisions of § 301(a).”); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 457 (6th Cir. 2001) (“If the promise amounts only to a promise to refrain from reproducing, performing, distributing or displaying the work, then the contract claim is preempted.”).

Other circuits, however, have endorsed the view that a promise is an “extra element.” *See, e.g., Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313, 1327 (11th Cir. 2010) (“To succeed on its breach of contract claims, Utopia must prove a valid license agreement, which constitutes an ‘extra element’ . . . . The rights

Supp. 425 (S.D.N.Y. 1996) (Mukasey, J.), have held that “the ‘extra element’ that saves a contract claim from preemption is the promise itself.” *Id.* at 439 (quoting *Brignoli v. Balch Hardy & Scheinman, Inc.*, 645 F. Supp. 1201, 1205 (S.D.N.Y. 1986)). See *Banxcorp*, 723 F. Supp. 2d at 614-617 (Karas, J.) (claim that licensee distributed and used copyrighted financial indexes in breach of limited, non-transferable license was not preempted); *eScholar, LLC v. Otis Educ. Sys., Inc.*, 387 F. Supp. 2d 329, 332-33 (S.D.N.Y. 2005) (claim that licensee failed to pay royalties or permit licensor audits under an agreement licensing a copyrighted data compilation was not preempted); *Sharp v. Patterson*, No. 03-CV-8772, 2004 WL 2480426, at \*7-\*8 (S.D.N.Y. Nov. 3, 2004) (Lynch, J.) (claim that author used scenes written by plaintiff without attribution or compensation as allegedly required by an agreement between them was not preempted); *Grauer v. Deutsch*, No. 01-CV-8672, 2002 WL 31288937, at \*2 (S.D.N.Y. Oct. 11,

Utopia asserts, therefore, are not ‘equivalent to’ exclusive rights under section 106, as required for preemption . . . .”); *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1318-19 (11th Cir. 2001) (“The rights sought to be enforced in Law Bulletin’s breach of contract claim are not equivalent to the exclusive rights of § 106, and, in order to succeed on its claim, Law Bulletin needed to show an extra element, the existence of a valid contract between the parties.”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453-55 (7th Cir. 1996) (holding that an action to enforce a restriction on duplication in a so-called “shrinkwrap license” on the packaging of copyright software was not preempted); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990) (“This action for breach of contract involves an element in addition to mere reproduction, distribution or display: the contract promise made by Taquino, therefore, it is not preempted.”). Cf. *Nat’l Car Rental Sys., Inc. v. Computer Assocs.*

*Int'l, Inc.*, 991 F.2d 426, 431 (8th Cir. 1993) (“We conclude that the alleged contractual restriction on National’s *use* of the licensed programs constitutes an extra element in addition to the copyright rights making this cause of action qualitatively different from an action for copyright.”) (emphasis supplied); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988) (“Implicit in the contract between Acorn and Swantz was an agreement that while Swantz did not have to use Acorn’s plans, if he did use Acorn’s plans then he was obligated either to purchase the plans from Acorn or to purchase his building materials from Acorn . . . . Acorn’s cause of action is based upon this implicit provision of the contract which does not arise out of the subject matter of copyright and is therefore a separate and distinct cause of action.”).

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2002) (Kaplan, J.) (claim to attribution as co-author pursuant to an agreement was not preempted); *Katz Dochtermann & Epstein, Inc. v. Home Box Office*, No. 97-CV-7763, 1999 WL 179603, at \*4 (S.D.N.Y. Mar. 31, 1999) (“KDE’s allegation that HBO made an implied promise to pay for its idea is entirely separate and apart from any claim for copyright infringement involving the literary work. The court finds that KDE’s claim for breach of implied promise to pay is not preempted.”); *Architectronics*, 935 F. Supp. at 439-441 (claim that licensee released software based on copyrighted code that was the subject of a limited, exclusive license requiring royalty payments was not preempted). *Cf. Cf. Gusler v. Fischer*, 580 F. Supp. 2d 309, 319 (S.D.N.Y. 2008) (claim for violation of non-disclosure agreement was not preempted because it was “premised on the existence of allegations beyond mere reproduction, [wa]s qualitatively different from the copyright infringement claim, and, therefore, [wa]s not preempted”); *Smith v. Weinstein*, 578 F. Supp. 1297, 1307 (S.D.N.Y. 1984) (“A party may by contract agree to pay for ideas, even though such ideas could not be



protected by copyright law. Rights under such an agreement are qualitatively different from copyright claims, and their recognition creates no monopoly in the ideas involved.”).

Other courts, however, following *American Movie Classics Company v. Turner Entertainment Co.*, 922 F. Supp. 926 (S.D.N.Y. 1996), have held that “a breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display).” *Id.* at 931. See *BroadVision*, 2008 WL 4684114, at \*4 (claim that licensee of copyrighted software had exceeded usage limits under non-exclusive license agreement was preempted because “it

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does not allege that [defendant] breached a promise to pay, to allow an audit, or any other promise”); *Price v. Fox Entm’t Group, Inc.*, 473 F. Supp. 2d 446, 460-61 (S.D.N.Y. 2007) (Scheindlin, J.) (claim that author failed to pay profits and attribute passages to the plaintiff was preempted in contrast to *quantum meruit* claim for “compensation for work [plaintiff] contributed to the screenplay that could, in theory, be considered separate and apart from ownership” and was “not necessarily preempted”); *eScholar LLC*, 387 F. Supp. 2d at 332-33 (adopting recommendation that claim that licensee violated limits in exclusive license on distribution and reproduction of copyrighted work was not preempted); *Grauer*, 2002 WL 31288937, at \*2 (claim for share of proceeds from co-authored work was preempted); *Cooper v. Sony Records Int’l*, No. 00-CV-233, 2001 WL 1223492, at \*5 (S.D.N.Y. Oct. 15, 2001) (claim that licensee producer of music copyrighted in plaintiff artists’ names had exploited music beyond scope of license was preempted); *Am. Movie Classics Co.*, 922 F. Supp. at 926, 931-2 (claim that licensor copyright owner showed films that had been

exclusively licensed for showing by the plaintiff was preempted); *Smith*, 578 F. Supp. at 1307 (“To the extent plaintiff rests his contract claim not on breach of the terms of the contract but on Weinstein’s having copied his property, the KKK script, in making ‘Stir Crazy,’ it is of course preempted.”).

“The crux of the dispute between the parties, therefore, is whether the promise inherent in any agreement, by itself, provides the extra element necessary to make a breach of contract claim qualitatively different from a copyright infringement claim.” *eScholar, LLC*, 387 F. Supp. 2d at 332. The Court finds that while the answer might be yes in some cases, in the circumstances of this case, the answer is no.

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In reaching that conclusion, the Court begins from the premise that whether contract claims are preempted by the Copyright Act does not lend itself to a bright-line rule. Rather, whether a given contractual promise renders a claim qualitatively different than a copyright claim must depend on what the promise is. The Second Circuit has instructed that preemption turns on “what [the] plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced.” *Computer Assocs. Int’l*, 982 F.2d at 716. A categorical rule that “the extra element that saves a contract claim from preemption is the promise itself,” *Architectronics*, 935 F. Supp. at 439, provides mere lip service to that instruction. As the court in *American Movie Classics Company* seemed to grasp, without referring to what the defendant has promised, a court cannot determine whether, by allegedly breaking the promise, the defendant has engaged in conduct for which the Copyright Act already provides the defendant relief:

[A] breach of contract claim is preempted if it is merely based on allegations that the

defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display). However, if the breach of contract claim is based on allegations that the parties' contract creates a right not existing under copyright law—a right based upon a party's contractual promise—and the plaintiff is suing to protect that contractual right, then the claim is not preempted.

922 F. Supp. at 931. *Cf. Smith*, 578 F. Supp. at 1307 (“To the extent plaintiff rests his contract claim not on breach of the terms of the contract but on Weinstein’s having copied his property . . . it is of course preempted . . . . But plaintiff also claims that Weinstein agreed, expressly or implicitly, to pay him for the value of his ideas if she decided to use them . . . . Rights under such an agreement are qualitatively different from copyright claims, and their recognition creates no monopoly in the ideas involved.”).

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Indeed, the leading treatise on copyright law endorses the position that “pre-emption should be found absent to the extent that a breach of contract cause of action alleges more than simply reproduction (or adaptation, distribution, *etc.*) of a copyrighted work.” 1 Nimmer on Copyright § 1.01[B][1][a][i]. That treatise argues that “causes of causes of action . . . denominated [as contract claims] at times may essentially allege nothing other than derogation of rights under copyright.” *Id.* In those cases, “a breach of contract cause of action can serve as a subterfuge to control nothing other than the reproduction, adaptation, public distribution, *etc.* of works within the subject matter of copyright. Those instances are to be deemed pre-empted.” *Id.* § 1.01[B][1][a][iii].

That position makes sense because a rule that “the extra element that saves a contract claim from preemption is the promise itself,” *Architectronics*, 935 F. Supp. at 439, seems hard to square with the Second Circuit’s instruction to “take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim.” *Briarpatch Ltd.*, 373 F.3d at 306. The Second Circuit’s “restrictive” posture seems directed at ensuring that elements are not treated as talismans but rather as indicia of overlap between the claimed relief and the relief available under the Copyright Act. Indeed, the language of the Copyright Act refers not to elements of state law claims as such but rather to state law “*rights* that are equivalent to *any* of the exclusive *rights* within the general scope of copyright . . . .” 17 U.S.C. § 301(a) (emphasis added); *see also Computer Assocs. Int’l*, 982 F.2d at 716 (“Section 301 thus preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.”) (quotation marks omitted). Consistent with this focus on the scope of

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rights rather than counting elements, the Second Circuit has found that the mere existence of an extra element such as intent does not render a claim qualitatively different for purposes of copyright preemption. *See Briarpatch Ltd.*, 373 F.3d at 306. There is no reason why the element of a promise should be any different.

In endorsing a contrary rule, several courts in this district have relied on *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453-55 (7th Cir. 1996) in which Judge Easterbrook, writing for a panel of the Seventh Circuit, held that an action to enforce a restriction on duplication in a so-called “shrinkwrap license” on the packaging of copyright software was not preempted.

Judge Easterbrook reasoned that contractual rights were not “equivalent to any of the exclusive rights within the general scope of copyright” because “[a] copyright is a right against the world” whereas contracts “generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’” *Id.* at 1454. In addition, noting that “[t]erms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets,” Judge Easterbrook expressed concern that finding no preemption would render unenforceable license restrictions on the use of and promises to pay for intellectual property. *Id.* at 1454-55.

In the Court’s view, the *ProCD* decision does not go nearly as far as courts in this district have taken it. For one, the Seventh Circuit found “it prudent to refrain from adopting a rule that anything with the label ‘contract’ is necessarily outside the preemption clause: the variations and possibilities are too numerous to foresee.” *Id.* at 1455. Accordingly, *ProCD* does not stand for the proposition that preemption is unwarranted in all breach of contract cases. Furthermore, Judge Easterbrook’s concern about disrupting efficient markets seems most warranted where, unlike here, the plaintiff

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has bargained for a promise to do something the Copyright Act does not require—for example, to pay royalties from, to attribute co-authorship of, or to prevent disclosure of copyrighted material. But the concern seems far less pressing where the defendant has merely breached a promise not to distribute copyrighted material. Such a promise is hardly unenforceable if the material is in fact copyrighted, since the plaintiff could always seek relief under the Copyright Act. Nor would proceeding under the Act vitiate the parties’ attempt at private ordering since “[a] valid license . . . immunizes the licensee from a charge

of copyright infringement, provided that the licensee uses the copyright as agreed with the licensor.” *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007); *see also United States Naval Inst. v. Charter Commc’ns, Inc.*, 936 F.2d 692, 695 (2d Cir. 1991) (“[A]n exclusive licensee of any of the rights comprised in the copyright, though it is capable of breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the copyright rights conveyed to it.”). In fact, a plaintiff might even be better off forcing an alleged infringer to raise licensure as an affirmative defense. Although, like a contract plaintiff who bears the burden of proving a breach, “the copyright owner bears the burden of proving that the defendant’s copying was unauthorized,” *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995), unlike in a contract action where the plaintiff must prove the existence of a contract, in a copyright action “the burden is on the alleged infringer to prove the existence of the license.” *Tasini v. New York Times Co., Inc.*, 206 F.3d 161, 171 (2d Cir. 2000).

In any event, there is no reason why preemption should not apply with respect to the particular promise at issue here. Canal+ alleges that Defendants have breached a promise to “cease dealing in and with any materials written or created by [them] which

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represent, incorporate or embody the Film or any elements in the Film, including without limitation, the text, characters, and situations in the Film, all of which elements shall be deemed to have reverted to [Canal+].” (Compl. ¶ 23; Slotnick Dec. Ex. E at 2.) In effect, Canal+ alleges that it licensed the rights to a musical adaption of the copyrighted Film for a term not to exceed one year from the date that Canal+ declined to produce the Musical, at which point the exclusive right to any adaption of the Film reverted to Canal+. However, that exclusive right flowed from the Copyright Act, not from the Agreement. Thus the claim that

Defendants usurped the exclusive right of Canal+ to adapt the Film is nothing more than a claim that Defendants have violated a right of Canal+ under the Copyright Act. Labeling that claim as one for breach of contract cannot change the fact that the claim is not “qualitatively different from a copyright infringement claim.” *Briarpatch Ltd.*, 373 F.3d at 305. Rather, the claim merely alleges that Defendants have committed “an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law.” *Id.* Accordingly, the Copyright Act preempts the claim that Defendants’ adaption is a breach of contract and that claim is dismissed.

### CONCLUSION

For the foregoing reasons, Defendants' motion [18] to dismiss the complaint in this action is GRANTED. Plaintiff's motion [9] to disqualify Defendants' counsel is DENIED as moot. The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: New York, New York  
March 29, 2011

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line and a small flourish.

---

Richard J. Holwell  
United States District Judge



APPENDIX C  
OPINION LETTER



BARRY I. SLOTNICK  
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Privileged & Confidential  
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April 20, 2009

Steven Lutvak  
200 East 27<sup>th</sup> Street, Apt 6E  
New York, NY 10016

Re: Proposed Theatrical Production Based Upon *Israel Rank* by Roy Horniman

Dear Steven:

You have asked us to give you an opinion regarding potential legal liability arising out of your proposed new musical play, tentatively titled *The Truth About Monty* (the "Play"), which is based on the public domain novel *Israel Rank* by Roy Horniman (the "Novel"). As you are aware, counsel for Canal + Image UK Ltd ("Canal+"), the owner of the worldwide copyright in the 1949 motion picture titled *Kind Hearts and Coronets* (the "Film"), which was also based on the Novel, has advised us in writing that it will take legal action, for purported violations of its intellectual property rights and breach of contract, if you go forward with staging the Play. Accordingly, you have asked us to provide our opinion on whether the Play infringes on any copyright existing in the Film, and whether, by authorizing the production of the Play, you would be in violation of the terms of an April 1, 2003 letter agreement (the "Agreement") (attached as Exhibit A hereto) with Canal+.

In order for us to render our opinion, you have furnished us with certain explanatory documents, namely a copy of the Agreement, a draft script for the Play dated March 26, 2009 (the "Monty Script"), an earlier draft script, titled *Kind Hearts and Coronets*, that you prepared while you were in negotiations with Canal+ for the rights to do a stage production based upon the Film (the "Kind Hearts Script"), and correspondence between you and your representatives and Canal+ and its representatives. Additionally, you and I have had several discussions regarding the history of your development of the Play, including negotiations with Canal+ for rights to do a stage production of the Film.

The opinions contained in this letter are based solely upon (i) the documents you provided to us as set forth above and statements made to us in the conversations described above, (ii) the sections of the United States Copyright Act cited in this letter, our interpretation thereof and our application of those sections to our understanding of the underlying facts, which is based upon the documents and conversations described above; and (iii) the other sources cited in this letter. If our understanding of the underlying facts or relevant documentation is in any way inaccurate or incomplete, please let us know; corrections of any factual inaccuracies or provision of additional facts may require an amendment to our opinion.

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### **I. Preparation of a New Play Based Upon a Public Domain Work (the Novel) Where Another Derivative Work (the Film) Already Exists**

As an initial matter, it is our opinion, based on a Copyright Research Report (the "Copyright Search," attached as Exhibit B hereto) obtained in or around August 28, 2008 by your attorneys at Grubman, Indursky & Shire, P.C., that the Novel is in the public domain. According to the Copyright Search, the Novel was first published in the United Kingdom in January 1907,<sup>1</sup> and the United States Copyright Act of 1976 ("Copyright Act") and the 1998 Copyright Extension Act operate together to create a bright line rule providing that works published before January 1, 1923 (such as the Novel) are in the public domain.<sup>2</sup> It is our understanding that the Novel is also in the public domain in the United Kingdom, though we cannot opine as to the state of the law outside of this jurisdiction.

It also appears, based on the Copyright Search, that the Film is based on the Novel. *See also*, e.g., [http://en.wikipedia.org/wiki/Kind\\_hearts\\_and\\_coronets](http://en.wikipedia.org/wiki/Kind_hearts_and_coronets) (stating that *Kind Hearts and Coronets* is "very loosely based on a book, *Israel Rank*, by Roy Horniman.").

Based upon these facts, analysis of the issues presented in this situation requires the explanation of three fundamental principles of copyright law. The first is that once a work, such as the Novel, has fallen into the public domain, all or any part of it may be freely copied without authorization from the prior copyright owner. The second is the concept of "derivative work." Where a subsequent work is based upon or is an adaptation of a preexisting or underlying work, it is deemed to be a "derivative work"<sup>3</sup> of that preexisting work. Here, the Film would be deemed a derivative work of the Novel. A derivative work is entitled to its own separate

<sup>1</sup> The Copyright Search revealed no record of copyright registration or subsequent renewal for this work.

<sup>2</sup> *See* United States Copyright Office, *How to Investigate the Copyright Status of a Work*, Circular 22, at 8 (2006) ("[T]he U.S. copyright in any work published or copyrighted prior to January 1, 1923, has expired by operation of law, and the work has permanently fallen into the public domain in the United States."); United States Copyright Office, *Extension of Copyright Terms*, Circular 15t, at 3 (2004) (same); 3-9A *Nimmer on Copyright* § 9A.04[A][1][b][iv], at p. 9A-26.3 ("Because protection for works first published anywhere in the world earlier than 1923 has since expired, those works are not subject to current U.S. protection . . .").

<sup>3</sup> A "derivative work" is defined in the Copyright Act as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101.

copyright that may be owned entirely by a party other than the owner of the copyright in the underlying work.

The third “fundamental” copyright principle applicable to this analysis “is that a copyright affords protection only for ‘original works of authorship’ and, consequently, copyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works.” *Silverman v. CBS Inc.*, 870 F.2d 40, 49-50 (2d Cir. 1989); see also *Filmvideo Releasing Corp. v. Hastings*, 668 F.2d 91, 92-93 (2d Cir. 1981). Accordingly, while any person may use a public domain work to create their own derivative work, where, as here, there already exists a derivative work that remains subject to copyright protection (here, the Film), the latter user of the public domain work may not use any elements of artistic expression that were added to, and original from, the underlying work in the still-protected derivative work. *Silverman*, 870 F.2d at 49-50. If the creator of the second derivative work were to incorporate elements or material that is substantially similar to original elements added in the first derivative work the resulting derivative work would be deemed to infringe the copyright in the first derivative work.<sup>4</sup>

A situation very similar to the one presented here was addressed by the Court of Appeals for the Second Circuit in *Silverman v. CBS Inc.* The plaintiff in *Silverman* had announced that he intended to produce a musical stage play based upon the characters from the well-known “Amos ‘N’ Andy” radio show. CBS, the owner of the copyrights in the scripts for episodes of the “Amos ‘N’ Andy” radio show and TV show and in the audiovisual TV episodes, had sent letters to plaintiff threatening to enjoin any such stage production if it copied material from its copyrighted works. Silverman sued CBS for a declaratory judgment setting forth his rights to use “Amos ‘N’ Andy” works. The court analyzed whether plaintiff’s proposed musical play infringed CBS’s copyrights in “Amos ‘N’ Andy” radio scripts, television scripts and television episodes. The court was faced with a situation where numerous radio scripts for shows broadcast prior to 1948 (the “pre-1948 scripts”) were in the public domain, yet many later, post-1948 “Amos ‘N’ Andy” radio scripts and television episodes remained subject to copyright protection.

In a holding that illustrates the respective rights of you and Canal + in the present situation, the court determined that plaintiff was free to use the “Amos ‘N’ Andy” characters in his musical since they were laid out in detail in the pre-1948 radio scripts and were placed in the public domain when the pre-1948 scripts entered the public domain. However, the court further held that plaintiff could not use “any further delineation of the characters contained in the post-1948 radio scripts and the television scripts and programs” if those works were protected by valid copyrights. With regard to plaintiff’s use of the additional protectable increments appearing in the still-copyrighted “Amos ‘N’ Andy” television episodes, the court stated:

<sup>4</sup> As a general matter, when courts compare two literary works, such as two books, or a play and a motion picture, to determine whether they are “substantially similar,” they look for “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events” in the two works. See, e.g., *Kong v. Walt Disney Pictures and Television*, 16 F.3d 1042, 1045 (9th Cir. 1994) (citations omitted).



Since only the increments of expression added by the films are protectable, Silverman would infringe only if he copies these protectable increments. It is, of course, likely that the visual portrayal of the characters added something beyond the delineation contained in the public domain radio scripts, but surely not every visual aspect is protected. For example, the fact that the characters are visibly Black does not bar Silverman from placing Black Amos 'n' Andy characters in his musical, since the race of the characters was a feature fully delineated in the public domain scripts. Similarly, any other physical features adequately described in the pre-1948 radio scripts may be copied even though those characteristics are visually apparent in the television films or tapes.<sup>5</sup>

Accordingly, because the Novel is in the public domain, the Copyright Act does not prohibit you from creating and exploiting a musical play based on the Novel, including any element from the Novel that is also included in the Film, so long as the production does not contain any protectable creative elements that are original to the Film.

In addition to using material from the Film that also appears in the Novel, you are also allowed under copyright law to use shared elements that are deemed unprotectable under copyright. For example, a longstanding fundamental principle is that copyright does not protect ideas or facts. It only protects the author's original expression of those ideas. As the Supreme Court explained:

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.<sup>6</sup>

Also, the related copyright doctrine of *scenes à faire* holds that sequences of events necessarily resulting from the choice of setting or situation or "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic" are not protectable under copyright law.<sup>7</sup> *Scènes à faire*s are "elements that follow naturally from a work's theme rather than from an author's creativity."<sup>8</sup> For example, attempted escapes by slaves and the chasing of fugitives through the woods with dogs are standard in a story about the slave

<sup>5</sup> *Silverman v. CBS Inc.*, 870 F.2d at 50.

<sup>6</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-350 (1991) (citations omitted); see also *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) ("Copyright law protects an author's expression; facts and ideas within a work are not protected.").

<sup>7</sup> *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980); see also *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006); *Aliotti v. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) ("No copyright protection may be afforded to the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls.").

<sup>8</sup> *MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir.2004).

trade and, therefore, unprotectable.<sup>9</sup> Similarly, the presence of “drunks, prostitutes, vermin and derelict cars” as well as “[f]oot chases ... and ... the familiar figure of the Irish Cop” are unprotectable because they appear “in any realistic work about ... policemen in the South Bronx.”<sup>10</sup> Likewise, “uniformed workers” managing a dinosaur zoo’s exhibits are unprotectable because they “flow from the uncopyrightable concept” of a dinosaur zoo.<sup>11</sup>

It is our opinion that the Monty Script does not copy any protectable elements of the Film. Please bear in mind, however, that there is no guarantee that a Court (or, potentially, a jury) will agree with our conclusions, particularly our factual conclusion, based on a comparison of the Monty Script, the Film and the Novel, that the Monty Script does not contain elements that are substantially similar to original, protectable elements of the Film. In addition, attention must be given to the visual aspects of any production of the Play based upon the Monty Script. Care must be taken that any original elements of the visual component of the Film not be reproduced in the staging of the Play in order to avoid infringement of a visual element of the Film.

## II. The Effect of the Agreement Between You and Canal+

Notwithstanding any of the foregoing, Canal+ will likely argue that the Agreement imposes stricter obligations than the Copyright Act, and precludes you from utilizing even non-protectable elements of the Film. Indeed, in its most recent letter, Canal+ placed more emphasis on a potential breach of contract claim than on its purported intellectual property rights. For the reasons stated below, however, it is our opinion that Canal+’s expected argument is not likely to succeed.

The Agreement, in relevant part, served to provide you with “the exclusive authorization, to the extent of the interests of [Canal+], from [April 1, 2003] through October 1, 2004 (the Term) to adapt the Film . . . as a live stage musical presentation . . .” (emphasis added). However, your right to actually stage the Play were limited and contingent. Under the terms of the Agreement, on or prior to the end of the Term you were required to provide Canal+ with written materials to enable it to assess its interest in producing or co-producing the Play and, if Canal+ elected to do so, it would have the sole right to enter into agreements to present the Play with you, on terms to be negotiated in good faith. If Canal+ elected not to produce or present the Play, you were granted (1) year to enter into a written agreement with a third-party producer; however, such agreement would not become effective unless you, Robert Freedman (your co-author), and such third-party producer “shall have entered into a fully-executed agreement with [Canal+] for live stage and ancillary rights in the Film as may be acceptable to [Canal+] in [its] sole discretion.” The Agreement further provided that you were not entitled to create, distribute or develop “any materials for the Play based on the Film other than individual copies for controlled distribution (and not redistribution or sale) to a select number of potential producers or not for profit theatres . . . .”

<sup>9</sup> *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y.1978) (claim against “Roots”).

<sup>10</sup> *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.1986) (claim against “Fort Apache, The Bronx”).

<sup>11</sup> *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996). (claim against “Jurassic Park”).



The Agreement's termination provision provided that, if Canal+ failed to (i) conclude negotiations with you to produce or present the Play, (ii) approve any third-party producer, or (iii) enter into a written agreement with you and such third-party producer for live stage and ancillary rights in the film, then:

[A]ll your rights hereunder shall immediately terminate, and you and the other Authors shall immediately thereafter cease dealing in and with any materials written or created by you which represent, incorporate or embody the Film or any elements in the Film, including without limitation the text, characters, and situations in the Film, all of which elements shall be deemed to have reverted to us.

At the outset, it is important to note that there is no question that, before entering into the Agreement, you were free to adapt a stage play from the Novel, so long as such play did not incorporate elements unique and original to the Film. It is also important to note that you approached Canal+ with the idea of adapting the Film into a stage play, and that you received no payment or other compensation for drafting the Kind Hearts Script. Nevertheless, we expect Canal+ to argue that the contractual language restricting you from dealing in materials which "represent, incorporate or embody the Film or elements in the Film" now precludes you from utilizing even non-original elements of the Film, even though such elements are in the public domain. In other words, Canal+ will argue that the Agreement precludes you from doing something that you were free to do before signing the Agreement.

However, it is our opinion that, under the correct interpretation of the Agreement, "elements of the Film" refers only to unique, original elements of the Film that would be subject to copyright protection (and not elements that are in the public domain, including but not limited to elements derived from the Novel), and that, following the termination of the Agreement, you are free to develop a stage play based on the Novel, just as you were free to do so prior to the Agreement. The language of the Agreement supports this interpretation. First, the Agreement provides that, following termination, the "elements in the Film" that you are precluded from utilizing "shall be deemed to have reverted" to Canal+. (emphasis added). The plain meaning of "revert" is "to go back to or return to the former owner,"<sup>12</sup> and rights which Canal+ never owned, such as rights to elements of the Novel that are in the public domain, cannot "revert" to Canal+. This language supports our interpretation that the "elements in the film" that you are precluded from utilizing consist solely of those elements that Canal+ owns, i.e., protectable elements, unique to the Film, that are the subject of Canal+'s copyright.

In addition, the opening sentence of the Agreement expressly states that your authorization to adapt the Film is only "to the extent of the interests of Canal+." In other words, Canal+ did not purport to convey to you any rights above and beyond what it owned, i.e., protectable elements of the Film subject to Canal+'s copyright. Aspects of the Novel which are in the public domain are outside the scope of this conveyance. Accordingly, this opening sentence supports the interpretation that, because Canal+ never intended to convey anything more than it actually

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<sup>12</sup> See <http://dictionary.reference.com/browse/revert>

owned (nor could it), it was not entitled to a “reversionary” interest in rights greater than what it conveyed.

Our interpretation is further supported by a well-settled principle of contract construction, which holds that contracts are to be interpreted so as not to render provisions meaningless.<sup>13</sup> Accepting Canal+’s argument, that “elements in the Film” includes elements that Canal+ does not even own, would render the Agreement’s “reversion” language irrelevant and an absurdity, and such a result is disfavored under New York law.

While there is a paucity of case law dealing with this exact situation, the Court in *Radio Today, Inc. v. Westwood One, Inc.*, 684 F. Supp. 68 (S.D.N.Y. 1988), analyzed comparable issues and contract language, ultimately determining that the defendant was not contractually obligated to compensate the plaintiff, a radio-programming developer, for using its “format” for a radio program. The *Radio Today* Court noted, among other things, that under the contract the plaintiffs were to be paid for developing particular radio programs, not for their format, and the agreement did not “purport to create separate rights with respect to the format of the programs.” *Id.* at 71. Here, similarly, the Agreement authorized you to adapt the Film only “to the extent of the interests of Canal+,” and did not purport to create separate rights beyond what Canal+ actually owned. In addition, the *Radio Today* Court held that the contract’s termination provision, which provided that “all right, title and interest in and to the Programs shall revert back to [plaintiffs]” reflected the parties’ intent to license defendant’s use of the programs themselves, but not the format. *Id.* at 71. Here, as in *Radio Today*, we believe that the Agreement’s “reversion” language indicates that you are precluded from utilizing only elements of the Film that Canal+ actually conveyed to you, and nothing more.

While we believe the proper interpretation of the Agreement does not restrict you from basing the Play on the public domain elements of the Novel, please be aware that the Agreement does contain some unfavorable language, on which Canal+ will rely. For example, the termination provision states that you shall cease dealing in materials that incorporate, *inter alia*, “situations” in the Film – such broad language can be read as restricting you from using elements of the film above and beyond what is protectable by copyright. In addition, the Agreement states that you were not entitled to distribute materials “based on the Film” beyond a select number of potential producers or theaters; in other contexts, the phrase “based on” in written contracts has been interpreted as prohibiting the use, without compensation, of elements of underlying works that are not subject to protection under copyright law.<sup>14</sup>

<sup>13</sup> *Muzak Corporation v. Hotel Taft Corporation*, 1 N.Y. 2<sup>nd</sup> 42 (“The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect.”), *Ronnen v. Ajax Electric Motor Corp.*, 88 N.Y. 2<sup>nd</sup> 582 (“We have long and consistently ruled against any construction which would render a contractual provision meaningless or without force or effect.”).

<sup>14</sup> This issue generally arises in the context of “idea theft” cases, in which Courts have held that a defendant may be contractually obligated to compensate a plaintiff for basing a work on the plaintiff’s idea, even if the plaintiff’s idea was not subject to copyright protection. *See, e.g., Buchwald v. Paramount Pictures, Corp.*, 1990 Cal. App. LEXIS



Despite such language, we believe that a fair reading of the Agreement as a whole indicates that Canal+ intended to authorize you to adapt those portions of the Film in which it held protectable rights, and that, if the parties could not agree on a final agreement for the live stage and ancillary rights, the parties would return to the position they were in prior to signing the Agreement. While Canal+ will argue that the reference to “elements of the film” in the termination provision precludes you from using even non-protectable elements, such an argument places form over substance, and New York courts will endeavor to give the words in contracts a fair and reasonable interpretation, rather than their mere literal meaning.<sup>15</sup> In any case, the phrase “elements of the film” is, at worst, ambiguous, and we believe it is likely that a court or jury would interpret that phrase in your favor. We note again that, prior to signing the Agreement, you were unquestionably free to base a stage production on the public domain Novel, and that you received no payment or other compensation from Canal+. While a party may contractually agree to limit its rights to do something it was previously free to do, including make use of public domain materials,<sup>16</sup> courts will interpret a contract so as to avoid unfair and anomalous consequences,<sup>17</sup> and we believe that it would be unduly harsh and unjustified to interpret the Agreement as requiring you to give up a right which you previously possessed. This is particularly so given that you have received no tangible benefit from the Agreement which would compensate you for giving up such a right.

While we believe that the proper interpretation of the Agreement does not restrict you from basing the Play on the public domain elements of the Novel, please note that there is some lack of clarity in the Agreement, and there is no guarantee that a Court will reach this result.

### III. Conclusion

Based on the above analysis, and subject to the qualifications, understandings and limitations expressed herein, we believe that a court of competent jurisdiction, properly apprised of the

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634, 12 U.S.P.Q2d (BNA) 1497 (Cal. App. 1990); *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996 (Cal. Ct. App. 1970). We believe such cases are distinguishable because, among other things, such cases typically involve a plaintiff who has presented a novel idea to the defendant, and thus there is ample consideration for the defendants’ agreement to compensate plaintiff for the use of the idea. See *Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368, 376 (2d Cir. 2000) (in order to support a claim for breach of contract based on the submission of an idea, plaintiff must establish that the “idea” presented was novel to the buyer). Here, by contrast, you were the one who first approached Canal+ with the idea of adapting the Film into a Play, not vice-versa, and Canal+ played no role in your subsequent decision to create a stage adaptation of the Novel.

<sup>15</sup> See, e.g., *Sutton v. East River Sav. Bank*, 55 N.Y.2d 550, 555 (1982); *Madison Ave Leasehold, LLC v. Madison Bentley Associates LLC*, 30 A.D.3d 1, 7 (1st Dep’t), *aff’d*, 8 N.Y.3d 59 (2006).

<sup>16</sup> See, e.g., *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 261 (1979).

<sup>17</sup> See, e.g., *Mason v. Electrol, Inc.*, 292 N.Y. 482 (1944) (“An interpretation of an agreement should be avoided . . . which results in such a harsh construction that it puts one party at the mercy of another.”); *River View Associates v. Sheraton Corp. of America*, 33 A.D.2d 187, 190 (1st Dep’t 1969) (“[P]arties to an agreement are presumed to act sensibly in regard to it and an interpretation that produces an absurdly harsh result is to be avoided”), *aff’d*, 27 N.Y.2d 718 (1970); see also *Lee v. Marvel Enters.*, 386 F. Supp. 2d 235, 244 (S.D.N.Y. 2005) (“Unfair and anomalous results are to be avoided.”); *In re Nat’l Basketball Assoc.*, 630 F. Supp. 136, 140 (S.D.N.Y. 1986) (contractual interpretation should “avoid a result which places one party at the mercy of the other”).



relevant facts and law, should hold that the Monty Script does not infringe on any legally protectable elements of the Film, and that the Agreement does not preclude you from basing the Play on the public domain Novel.

As you know, there is always the risk that a court will reach a conclusion different from ours, which may result in an adverse finding of copyright infringement and/or breach of contract, patent infringement. Moreover, while we have concluded that the staging of the Play based on the Monty Script would not likely result in liability for copyright infringement or breach of contract, it is important to note that attorneys advising Canal+ have apparently urged their client into a contrary position, leading their client to believe that a claim may be supported. While we have a high degree of confidence in the soundness of our opinion above, and in our judgment an infringement and/or breach of contract suit could successfully be repelled, due to the nature of litigation we cannot guarantee such a result.

Further, the United States Copyright Act is impacted by new court decisions which interpret and apply the statutory requirements set forth in the Copyright Act. The opinions expressed herein are necessarily predicated upon the state of the law as we have found it to exist as of the date of this letter. It is conceivable that the Copyright Act and the decisions interpreting the Act may materially change by the time any copyright infringement claim is asserted. Such material changes in the law may have the potential effect of either reinforcing or undermining, in whole or in part, the legal opinions expressed in this letter. In addition, there is a paucity of cases in the context of New York contract law dealing with the situation present here or comparable contract language, and it is conceivable that additional relevant decisions will be issued subsequent to the date of this letter. Thus, should a copyright infringement or breach of contract claim be brought, a further review of the then-current state of the law and a supplement to this opinion letter is appropriate and advised.

This opinion is limited to the matters stated herein and no opinion is inferred or may be implied beyond the matters expressly stated. Furthermore, our opinion is based upon our current understanding of the facts as described in this letter, including the version of the Monty Script dated March 26, 2009. If the Monty Script is revised in any way, or if our understanding of the facts is in any way inaccurate, please contact us to discuss whether this opinion should be supplemented.

This opinion is intended to be relied upon solely by Steven Lutvak and Robert Freedman. We remind you that the attorney-client privilege attaches to this document as it does to all communications between a client and the attorney. Accordingly, this letter is not prepared for circulation, quotation or public filing, and is not prepared for reliance upon for any purpose other than the evaluation of the matters we have described. Moreover, sharing this letter with any third party may jeopardize your right to assert attorney-client privilege with respect to our opinion and with respect to materials that we prepared and gathered in the course of preparing our opinion.

Subject to the foregoing, we understand that you may choose to disclose this opinion letter to potential third-party producers of the Play. Please be aware that such disclosure may constitute a



Steven Lutvak  
April 20, 2009  
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waiver of the attorney-client privilege with respect to this letter. However, to the extent this letter is provided to such third-party producers for the purpose of establishing and advancing a common defense strategy with respect to the subject matter herein, such disclosure should not be found to constitute a waiver of the attorney-client privilege with respect to this letter or its subject matter. In addition, because this opinion is intended to be relied upon solely by you, in the event that you choose to disclose this opinion letter to third parties, you should advise them to consult with counsel of their own choosing regarding the subject matter herein.

If you have any questions or comments regarding this opinion, please do not hesitate to contact the undersigned.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Barry I. Slotnick", written over a horizontal line.

Barry I. Slotnick  
Partner

Attachments

cc: Robert Freedman

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## APPENDIX D

PROGRAM LIST FROM "STEVEN LUTVAK: THE JOURNEY OF A GENTLEMEN," DOCTORAL  
RECITAL OF TREGONEY SHEPHERD, FEATURING STEVEN LUTVAK, FEBRUARY 22, 2014



PROGRAM LIST FROM "STEVEN LUTVAK: THE JOURNEY OF A GENTLEMAN"  
DOCTORAL RECITAL OF TREGONEY SHEPHERD FEATURING STEVEN  
LUTVAK, FEBRUARY 22, 2014

"I Don't Know What I'd Do" from *Kind Hearts and Coronets*

Music and Lyrics by Steven Lutvak and Robert Freedman

"Unexpected Complications"

Music and Lyrics by Steven Lutvak

"Guide Me (Trio)" from *Esmeralda*

Music and Lyrics by Steven Lutvak

"A Song About a Poem About a River" from *Almost September*

Music and Lyrics by Steven Lutvak

"Museums"

Music and Lyrics by Steven Lutvak

"The Dinner Party"

Music and Lyrics by Steven Lutvak

"A Homily From Sister Aimee" from *Campaign of the Century*

Music and Lyrics by Steven Lutvak

"Kind Hearts Matter Most of All" from *Kind Hearts and Coronets*

Music and Lyrics by Steven Lutvak and Robert Freedman

"Inside Out" from *A Gentlemen's Guide to Love and Murder*

Music and Lyrics by Steven Lutvak and Robert Freedman

"Sibella" from *A Gentlemen's Guide to Love and Murder*

Music and Lyrics by Steven Lutvak and Robert Freedman

"She's a Guernsey" from *Kind Hearts and Coronets*

Music and Lyrics by Steven Lutvak and Robert Freedman

"Mother Is On Your Shoulder" from *Kind Hearts and Coronets*

Music and Lyrics by Steven Lutvak and Robert Freedman

"Patience" from *Kind Hearts and Coronets*

Music and Lyrics by Steven Lutvak and Robert Freedman

"My View of Your From the Piano"

Music and Lyrics by Steven Lutvak